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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 666

THE CHIPPEWA INDIANS OF MINNESOTA,

Appellants,

vs.

THE UNITED STATES,

Appellee.

BRIEF FOR APPELLANTS

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Opinions Below.

The opinions of the Court of Claims in this case have not been officially reported. The original opinion, announced November 14, 1938, appears in the record at page 56. The supplemental opinion disposing of the motions for new trial made by each of the parties, announced January 9, 1939, appears in the record at page 72.

Jurisdiction.

The grounds upon which the jurisdiction of this court is invoked are set out in appellants' Jurisdictional Statement filed herein under Rule 12 of this court, heretofore printed.

Jurisdiction was conferred by the Special Jurisdictional Act of June 22, 1936 (49 Stat. at L. 1826). The judgment of the Court of Claims appealed from became final January 9, 1939 (R. 79). The appeal was allowed by the Chief Justice of the Court of Claims January 24, 1939 (R. 83). Probable jurisdiction was noted by this court March 6, 1939.

STATEMENT OF THE CASE

The Questions Presented.

The statement of the facts shown by the record will be more significant if preceded by a brief statement of the nature of the issues involved.

In this action appellants, who were plaintiffs in the court below, seek to recover from the United States amounts claimed to have been wrongfully diverted by the United States from the permanent or principal trust fund defined in Section 7 of the Act of January 14, 1889 (25 Stat. 642), and established by the express terms of the agreements entered into pursuant to that Act. This trust fund represents the proceeds of the disposal by the United States of the Indian lands ceded by those agreements. Under the terms of the Act and agreements it was to be a "permanent fund" distributable at the end of the trust period to a class defined as "said Chippewa Indians and their issue then living" in equal shares.

As will appear more fully in the discussion of the Special Jurisdictional Act conferring jurisdiction on the Court of Claims to hear and determine the claims in suit *(infra)*, appellants are clearly authorized to maintain suits for any damage sustained by this class of ultimate distributees by reason of any unlawful diminution of this "permanent fund."

since a specific amendment of the Jurisdictional Act provides that in this litigation appellants, "the Chippewa Indians of Minnesota," shall be "considered as representing and including *all those entitled to share in the final distribution of the permanent fund* provided for by Section 7 of the Act of January 14, 1889" (Finding 1, R. 34).

It is without dispute in the record, and the findings of the Court of Claims show affirmatively, that large sums were withdrawn by defendant from the principal trust fund in question, for purposes wholly unauthorized by any provision of the agreements entered into under the Act of January 14, 1889. With certain exceptions, these diversions of the trust fund were made pursuant to Acts of Congress which purported to authorize them, and the Court of Claims, though recognizing that these disbursements were in violation of the trust as originally defined and agreed to, denied recovery upon the stated ground that the principal fund in question *constituted tribal property subject to the plenary power of Congress*, and that therefore no recovery might be had. As to certain other withdrawals and disbursements made by defendant's officers without authority of specific Acts of Congress, the court held that the same were authorized and proper under the terms of the Act of January 14, 1889, itself.

The correctness of these conclusions is the matter at issue here.

The Jurisdictional Act and the Proceedings in the Court of Claims.

This suit is brought pursuant to authority granted by a Special Jurisdictional Act approved May 14, 1926 (44 Stat. 555), and amended by the Acts of April 11, 1928 (45 Stat. 423), and June 18, 1934 (48 Stat. 979). The material portions of the Jurisdictional Act as so amended appear in Finding No. 1 (R. 33-4). Section 1 as so amended and so far as here material reads:

> "Sec. 1. That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party as in other cases, notwithstanding the lapse of time or statute of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of the Act of January 14, 1889 (25 Stat. L. 642), or arising under or growing out of any subsequent Act of Congress in relation to Indian Affairs which said Chippewa Indians of Minnesota may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States. *In any such suit or suits the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in the final distribution of the permanent fund provided for by Section 7 of the Act of January 14, 1889 (25 Stat. L. 642), and the agreements entered into thereunder.* * * *"

The last and italicized sentence in the above quotation was added to the Jurisdictional Act by the Act of June 18, 1934 *(supra)*.

Section 4 of the Jurisdictional Act, so far as here material, reads as follows (R. 34-5):

> "Sec. 4. If it be determined by the court that the United States, in violation of the terms and provision of any law, treaty, or agreement as provided in Section 1 hereof, has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest thereon, at 5 per centum per annum from the date thereof. * * *"

Section 10 of the Jurisdictional Act (R. 5) makes the following provision as to the disposition of any amounts recovered:

> "Sec. 10. The proceeds of all amounts, if any, recovered for said Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 5 per centum per annum from the date of the judgment or decree."

Appellants filed their original petition in this case in the Court of Claims on April 13, 1927, and thereafter on August 18, 1930, by leave of court filed their amended petition. On September 27, 1930, defendant answered by a general traverse. A second amended petition was filed August 22, 1935, to which defendant also filed a general traverse (Finding 2, R. 35).

The case came on for hearing on the merits and was argued and submitted. On November 14, 1938, the court filed its special findings of fact and decision directing the dismissal of the petition. Motions for amended findings and for new

trial having been filed by both parties, the court on January 9, 1939, filed its amended special findings of fact (R. 33) followed by its conclusion of law that the petition be dismissed (R. 56). Appended to these amended findings was the original opinion of November 14, 1938 (R. 56), and a new supplemental opinion (R. 72), disposing of the motions for new trial, and directing that the original opinion and judgment should stand.

From the judgment so entered this appeal is taken.

The Indian Titles Preceding the Act of January 14, 1889.

At the time of the passage and approval of the Act of January 14, 1889, and for a long time prior thereto, the various bands or tribes of Chippewa Indians then located in Minnesota resided on twelve reservations in that state as to which the Indian title had not been extinguished (Finding 3, R. 35).

The Indian band, or bands, occupying each separate reservation were recognized and dealt with as having a separate and complete Indian title to the lands therein to the exclusion of all the other bands, who had no right to share therein, or to participate in the proceeds thereof (*Chippewa Indians of Minnesota vs. United States*, 301 U. S. 358, at 360-1).

These bands then located in Minnesota were part of the great Chippewa tribe which ranged, without regard to state boundaries, over Michigan, Wisconsin, Minnesota and the Dakotas. Thus the Court of Claims says (R. 64):

> "What we intend to hold and what we think the record sustains is that 'About the beginning of the last century the Chippewas constituted one of the larger Indian tribes in the northerly part of the United States. In early treaties they were dealt with as a single tribe

and were shown to be occupying a large area reaching from Lake Huron on the East to and beyond Lake Superior on the West. In later treaties they were regarded as divided into distinct bands; and particular bands —in some instances a single band and in others a limited plurality of bands—were recognized as occupying separate areas in Michigan, Wisconsin, Minnesota, and eastern Dakota, and as entitled to hold or cede the same independently of other bands and of the Chippewas as a whole.' *Chippewa Indians vs. United States*, 301 U. S. 358, 360, 361."

This was the situation when the Act of January 14, 1889, was adopted.

The Act of January 14, 1889, and the Agreements of Cession.

The Act of January 14, 1889 (25 Stat. 642), appears in full in Finding No. 4 (R. 35 to 42). By that Act the President was authorized to designate commissioners to negotiate with "all the different bands of Chippewa Indians in Minnesota" for the complete cession and relinquishment of their title and interest in all their reservations (except so much of the White Earth and Red Lake Reservations as was required to make and fill the contemplated allotments).

The cessions so to be procured were to be "for the purposes and upon the terms hereinafter stated." Provision was made for allotments in severalty, the Act contemplating the allotment of the Red Lake Indians on the Red Lake reservation and the removal of the bulk of all the other Chippewa Indians to the White Earth reservation, to be there allotted. All lands not required for allotment were to be disposed of by the General Land Office, the timber lands to be sold to

the highest bidder as provided in Section 5, and the agricultural lands to be disposed of to settlers under the Homestead Law as provided in Section 6 of the Act. The proceeds were to be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota.

The provisions with regard to the disposal of the funds resulting from the sale of the ceded lands are embraced in Section 7 of the Act (R. 40), and were summarized with brevity and precision by this court in *Chippewa Indians of Minnesota vs. United States*, 301 U. S. 358, 364, as follows:

> "As provided in Sec. 7 of the Act, all money accruing from the disposal of the ceded lands, after deducting enumerated expenses, was to be placed in the Treasury of the United States to the credit of *'all the Chippewa Indians in the State of Minnesota as a permanent interest bearing fund'* for the period of fifty years. The interest was to be used for the support and education of such Indians, and at the end of the fifty years the permanent fund was to be divided and paid to *'all of said Chippewa Indians and their issue then living'* in cash and equal shares, *subject to a reserved power in Congress to make limited appropriations from the fund during the fifty year period for the purpose of promoting civilization and self-support among these Indians.*"

The provision referred to by the court as to the use of the interest "for the support and education of the Indians" provided, in substance, for the expenditure of one-fourth of such interest for a system of free schools among the Indians and for the distribution of all of the balance of interest annually in equal per capita payments to "said Indians."

The "*reserved power in Congress to make limited appro-*

priations from the fund," referred to by the court, is that set forth in the proviso to Section 7, as follows:

> "Provided, that Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof."

The *"enumerated expenses"* authorized to be deducted from the proceeds of the lands included only the government's "expenses hereunder" (*i. e.*, expenses involved in carrying out the Act). Specifically described in said Section 7 as so deductible are the expenses of (1) making the required census of each band; (2) obtaining the cessions; (3) effecting the removal and allotments; and (4) completing the surveys and appraisals of the ceded lands. One further deduction or reimbursement for the fund was authorized by Section 7 (R. 41); *i. e.*, the defendant was authorized to reimburse itself when the fund reached $3,000,000 for "all the advances of interest made as herein contemplated." The advances of interest are provided for in the same section, *i. e.*, "the sum of $90,000 annually * * * less any interest that may in the meantime accrue from accumulations of said permanent fund."

Except for these specified purposes, *i e.* (1) the payment of defendant's expenses in carrying out the Act, (2) the disbursement of not more than five per cent of the fund for "promoting self-support and civilization" under what the court termed a "reserved power in Congress to make limited appropriations," and (3) reimbursement for interest advanced "as herein contemplated," neither the Act of January 14, 1889, or the agreements entered into thereunder contemplated or authorized the expenditure of a dollar of the

"permanent fund" for any purpose whatever, until the final distribution.

As authorized by the Act, the President appointed commissioners who met with all the different bands or tribes of Chippewa Indians in Minnesota, and after holding numerous council meetings, concluded agreements of cession with each and all of the different bands, for the uses and purposes expressed in the Act of January 14, 1889. That Act was embodied in each of the agreements either verbatim or by express reference, and each agreement recited that the Act had been read, interpreted and thoroughly explained to the understanding of the Indians, who consented and agreed to the Act and accepted and ratified the same. Each agreement expressly provided that the lands in question were ceded "for the purposes and on the terms" stated in the Act. These agreements of cession were, on March 4, 1890, accepted and approved by the President, and thereupon, under the express language of the Act, became effective (Finding 5, R. 42).

The Administration of the Trust and the Ground of the Decision Below.

Defendant proceeded with the disposal of the ceded lands, and established in the Treasury an interest-bearing principal fund designated as "Chippewas in Minnesota Fund" which was the "permanent fund" provided for by Section 7 of the Act of January 14, 1889, and in which the proceeds of the disposal of the ceded lands were placed as received. There was further established in the Treasury a separate non-interest bearing fund, designated as "Interest on Chippewas in Minnesota Fund," to which was credited interest at the rate of five per cent per annum on the principal fund.

and from which the annual distributions of interest were made (Finding 6, R. 43).

As shown by the findings of fact, defendant's principal withdrawals and disbursements from the principal fund to June 30, 1927, may be classified as follows:

(a) $896,246.93 withdrawn as reimbursement to defendant for amounts appropriated as advance interest (Findings 7 and 8, R. 43-4).

(b) $2,338,828.49 withdrawn as reimbursement for expenditures made under appropriations by Congress "To enable the Secretary of the Interior to carry out an Act entitled 'An Act for the relief and civilization of the Chippewa Indians in Minnesota, approved January 14, 1889'" (Findings 9 and 10, R. 45-7).

(c) $2,526,267.74 disbursed directly from the principal fund under appropriations of Congress for "promoting civilization and self support" among the Indians (Finding 15, R. 49).

(d) $547,421.25 disbursed directly from the principal fund on the theory that such disbursements were authorized by the Act of January 14, 1889, and without further appropriation by Congress (Finding 16, R. 50).

(e) $5,684,341.50 disbursed directly from the principal fund in per capita payments to individuals made from the fund under Acts of Congress (Findings 21, 22, 23, R. 54-5).

The court below held all of said expenditures lawful. Appellants, suing as representatives of those entitled to share in the ultimate distribution of the "permanent fund," assert that a large part of such expenditures were in fact for purposes and in amounts wholly unauthorized by the Act of 1889 and the agreements made thereunder, and hence

unlawfully reduced the fund remaining for distribution. The nature and amount of these claims appear from the findings, which show:

(a) That during the years 1891-1896, inclusive (the only years when the interest actually accruing did not, in fact, exceed $90,000 per year), the interest actually advanced exceeded the interest "in the meantime accruing from accumulations of said permanent fund" by only $664,236.02. As a result, by invading the principal fund for reimbursement in the sum of $896,246.93, defendant appropriated from the fund $232,010.91 in excess of the amount contemplated by the provisions of Section 7 of the Act of January 14, 1889 (Finding 7, R. 43).

(b) That included in the expenditures made under appropriations to enable the Secretary of the Interior to carry out the Act of 1889, and for which defendant was reimbursed out of the "permanent fund," was only $328,163.95 expended for purposes connected with carrying out that Act (*i. e.*, for the expenses of the commission appointed to conduct the negotiations, make the census, conclude the agreements of cession, and supervise the allotments under the Act; for surveying, examining, appraising, allotting and sale of lands; for removals; for transportation; for councils and delegations, etc.), while $2,010,461.37 was expended for purposes wholly foreign to the Act (Findings 9 and 10, R. 45 to 47), including over $1,000,000 for "education" (which was to have been provided for out of the interest fund), and substantial amounts (more than $300,000) for the expense of maintaining and housing defendant's Indian service (Finding 10, R. 46).

(c) That the total of all receipts at any time credited to the permanent fund was $17,662,325.70 (Finding 13, R.

47). Congress reserved the power to appropriate a total of not more than five per cent of the "permanent fund" for "promoting civilization and self support." The total disbursed from the "permanent fund," under appropriations for this purpose, was $2,526,267.74 (Finding 15, R. 49).

(d) A total of $2,311,493.19 was disbursed from the permanent fund under Acts of Congress, for the purposes listed in Finding 17 (R. 51). The court of claims itself characterizes these expenditures as "other than amounts disbursed for purposes authorized by the Act of January 14, 1889." This characterization is justified. The total includes $439,000 for "education," and additional payments of over $180,000 to the Minnesota school system, and approximately $500,000 for the expenses of defendant's Indian agencies.

(e) The further sum of $547,421.25 was disbursed directly from the Chippewa fund without any specific appropriation by Congress solely under authority of the Act of January 14, 1889 (Finding 16, R. 50). The sole authority given by that act for expenditures directly from the fund is the provision of Section 7 (R. 40) authorizing the "deduction" of the expenses of (1) making the census, (2) obtaining the cession and relinquishment, (3) making the removals and allotments, and (4) completing the surveys and appraisals. There is no authority for any deduction or charge to the Indians for the expenses of the sale of the ceded lands, which under Sections 5 and 6 of the Act (R. 39-40) was to be conducted by the Land Office, nor was there any authority for the separate sale of timber. The court finds that this sum of $547,421.25 is part of the sum of $669,606.34 expended for "surveying, allotting, sale, etc., of lands; expenses, care and sale of timber; removals; trans-

portation of supplies; councils and delegations; examining and appraising land, as more fully set out hereafter" (Finding 16, R. 50). The exact makeup of this item of $669,606.34 appears in Finding 19 (R. 53) as follows:

"Expenses surveying, allotting sale, etc., of lands	$ 18,762.69
Expenses, care and sale of timber	*531,484.43*
Removals	942.04
Transportation of supplies	36,924.26
Councils and delegations	63,411.67
Examining and appraising land	18,081.25
	$669,606.34"

It will be noted that of the total $531,484.13 for "care and sale of timber" is not included in the purposes for which expense deductions were authorized. The Court of Claims disposes of this situation with the bare statement (R. 71) that "Expenditures for the survey, allotment and sale of ceded lands totalled $669,606.34, and were expressly authorized by the provisions of the Act of January 14, 1889."

(f) There is no claim that the per capita distributions from the permanent fund ($5,684,341.50) find any justification in any provision of the Act of January 14, 1889, or the agreements, and they are rested solely on the various later acts authorizing them (R. 77), and the plenary power of Congress over tribal property.

As to such of these disbursements as were made pursuant to Acts of Congress, the Court of Claims said (R. 58) (italics ours):

> "The defendant not only failed to observe the terms of the trust but, on the contrary, has depleted the trust fund by various disbursements to the Indians. The

amount thus disbursed is the amount of the judgment sought.

"The record establishes the fact that the defendant has disbursed from the fund created by Sections 7 and 8 of the act of 1889. We say disbursed—perhaps we should say has reimbursed the Treasury from the fund to the extent of appropriations made by Congress and paid to the plaintiff Indians, Congress authorizing the reimbursement in most instances, *for purposes not mentioned in the act of 1889 and contrary to the terms of the alleged trust agreement.*"

These disbursements are justified by the court and recovery is denied solely upon the ground that this was a tribal fund, subject to the plenary power of Congress. Thus the lower court said (Supplemental Opinion, R. 73):

"If Congress determined to utilize the existing fund for a generation of tribal Indians who in their judgment needed it to ward off the hardships of life, and who were really the creators of the fund, it was a matter for Congress to determine and not the courts."

The item of $5,47,421.25 discussed under paragraph (e), *supra*, was disposed of by the Court of Claims on the ground there stated.

As to the excessive withdrawals from principal taken by the defendant in reimbursement for interest advances discussed under paragraph (a) above, the Court of Claims said (R. 67):

"The wording of this portion of the appropriation act discloses that Congress in its conception of its obligations under the act of 1889 appropriated each year the $90,000 advance interest payment without respect to

the interest fund accumulating upon the permanent fund from year to year. Obviously, if Congress had been aware of the extent of interest accumulations it could have omitted these advance appropriations at least eight years sooner.

"While technically it may be asserted that Congress did not strictly observe the provisions of the act of 1889, it is indisputable that the present plaintiffs suffered absolutely no loss."

Finding No. 20; Offsets.

Finding No. 20 (R. 54) reads as follows:

"20. During the period January 14, 1889, to June 30, 1934, the United States expended out of its public funds for the use and benefit of the Chippewa Indians of Minnesota the sum of $5,065,878.95, no part of which sum has been reimbursed to the United States."

This finding has no direct bearing on any of plaintiffs' claims. Section 3 of the Special Jurisdictional Act (R. 34) provided that "gratuities, if any, paid to or expended for said Indians subsequent to January 14, 1889," might be pleaded as offsets in actions brought under the authority of the Act. Although no offsets were pleaded, defendant contended below that expenditures aggregating $5,065,878.95 constituted proper offsets under this provision.

Substantially all of this claim was contested by plaintiffs. The total included amounts expended in the performance of treaty obligations; an amount appropriated as payment to the Indians for swamplands agreed to be included in reservations but in fact patented to the state; amounts expended for buildings which at all times have been, and still

remain, the unrestricted property of the government; amounts expended for such governmental purposes as the enforcement of the liquor laws; allocations on a percentage basis of the cost of operating non-reservation Indian schools, and similar items. Appellants contended that a major part of these expenditures were not proper offsets, because they were either (1) not gratuities, but amounts expended in the performance of defendant's treaty and other obligations, or (2) not "paid to or expended for" the Indians. Having found that plaintiffs were not entitled to recover, the court below made no determination of the issues thus raised, and in its original decision filed November 14, 1938, made no finding whatever on this subject.

The United States, in its motion for a new trial, requested a finding on this subject, stating:

> "The purposes of this requested amendment are, in the event of an appeal, (1) to advise the Supreme Court that the United States has expended gratuitously large sums for the plaintiff Indians which the defendant would be entitled to offset, and (2) in the event of rulings adverse to defendant, by the Supreme Court, to avoid the possibility of a mandate foreclosing the Court of Claims from giving further consideration to, and applying, all proper offsets."

The Court of Claims refused to include in the finding a statement requested by defendant that the amounts claimed had been expended gratuitously "under no obligation to do so," and as the finding now stands, it merely shows a total expenditure, whether pursuant to treaty or other obligations or otherwise, of said $5,065,878.95. It further appears that this total expenditure includes amounts expended up to June 30, 1934, thus including as offsets claims accruing

seven years after this suit was started, and seven years after the last date covered by the General Accounting Office Report upon which plaintiffs' claims are based.

The question of what part, if any, of the expenditures so made constitute "gratuities paid to or expended for said Indians," subject to offset under the Act, will be for determination by the Court of Claims upon a retrial, and appellants concede that the mandate should not foreclose such a consideration.

ASSIGNMENTS OF ERROR

Appellants rely upon and intend to urge as ground for reversal each of the errors assigned in the petition for allowance of this appeal (R. 79), and accordingly here assign as error that the Court of Claims erred in each of the following respects:

I.

In holding that the class designated in the Act of January 14, 1889 (25 Stat. 642), and in each of the agreements entered into thereunder, as "all the Chippewa Indians in Minnesota" was not a new class, but was a formerly existing and recognized tribal organization previously known by that name.

II.

In holding that by assenting to the Act of January 14, 1889, and entering into agreements of cession for the uses and purposes expressed in that Act, the bands of Chippewa Indians in Minnesota "returned to a single tribal organization precisely as the same had existed before their recognition as separate bands."

III.

In holding that the mutual assent of the parties to the agreements entered into under the Act of January 14, 1889, did not create a contract.

IV.

In holding the permanent or principal fund created pursuant to the agreements entered into under the Act of January 14, 1889, and limited and defined in Section 7 of said Act, to be a tribal fund subject to the plenary control of Congress over tribal property.

V.

In holding the rights of those entitled to share in the final distribution of said permanent fund to be tribal rights, subject to the plenary control of Congress over tribal property.

VI.

In holding that the amounts withdrawn from said permanent fund as payment or reimbursement for "the expense of defendant's Indian agencies, and other costs of governmental activities in Indian affairs" (Opinion p. 36) though admittedly unauthorized by any provision of the Act of January 14, 1889, constituted a disposition authorized under the plenary power of Congress, and that plaintiffs, though representing those entitled to share in the final distribution of said fund, are therefore not entitled to recover on account of the diversion of said fund to such purposes.

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VII.

In holding that amounts disbursed from said permanent fund in per capita cash payments to individuals, although admittedly unauthorized by any provision of the agreements made pursuant to the authority contained in said Act of January 14, 1889, constituted a disposition of said fund authorized under the plenary power of Congress, and that plaintiffs, though representing those entitled to share in the final distribution of said fund are therefore not entitled to recover on account of the diversion of the fund to this purpose.

VIII.

In holding that although defendant's officers in 1911 erroneously made unauthorized and excessive withdrawals from said permanent fund as reimbursement for payment of advance interest previously distributed to the then interest beneficiaries, those entitled to share in the final distribution of said permanent fund suffered no loss thereby, and that plaintiffs, although expressly including and representing said ultimate distributees are not entitled to recover therefor.

IX.

In holding that plaintiffs are not entitled to recover for the amount by which the total disbursements from said permanent fund under appropriations "for the purpose of promoting civilization and self support among said Indians" (Finding 15) exceeded a total of five per cent of said permanent fund (Finding 13).

X.

In holding that amounts withdrawn by defendant from said permanent fund to reimburse itself for expenditures for the drainage of lands ceded by the agreements made under said Act of January 14, 1889, and for the erection of school buildings (Findings 11 and 12) were so withdrawn in accordance with the implied purposes of that Act, and that plaintiffs are not entitled to recover therefor.

XI.

In holding that plaintiffs are not entitled to recover for amounts disbursed from said permanent fund for each of the purposes set forth in Finding 17.

XII.

In holding that the disbursement from said permanent fund of the sum of $547,421.25 referred to in Finding 16 constituted a lawful disposition of said fund in accordance with said Act of January 14, 1889.

XIII.

In holding as a conclusion of law that plaintiffs are entitled to no recovery, and in directing that the petition be dismissed.

XIV.

In entering judgment dismissing plaintiffs' petition.

SUMMARY OF ARGUMENT

The points made in the following argument may be briefly summarized as follows:

I.

Appellants are authorized to maintain this suit, against the United States as trustee, to redress wrongs suffered by the ultimate distributees of the trust,

(a) under the plain language of the Jurisdictional Act providing that equitable as well as legal claims shall be adjudicated, and that appellants in this litigation shall be considered as representing those entitled to share in the final distribution, and

(b) under the ordinary rules governing litigation in equity to charge a trustee for breaches of trust, such rules permitting representative suits to redress wrongful diversions of corpus to the damage of undetermined remaindermen, and even of remaindermen not yet in being.

II.

The agreements of cession under the Act of 1889 constituted valid contracts "binding upon the Indians no less than the United States," and the trust fund and the rights of the remaindermen therein were not tribal, nor subject to be depleted in the exercise of the plenary control of Congress over tribal property, because

(a) The cession by the separate bands of their separate reservations and the creation, out of the proceeds of all the reservations, of a common trust fund in which all share equally per capita, was not a result which was, or could have been, effected through the exercise

of the plenary power of Congress, but depended for its validity upon the agreements which were valid contracts "binding upon the Indians no less than the United States," and which define and limit the arrangement to which the Indians assented.

(b) The class of persons designated by the Act of 1889 and the agreements of cession as the ultimate beneficiaries of this trust was not coincident with any existing or former tribe or band or tribal organization.

(c) The class of persons so designated as the beneficiaries of the trust has none of the characteristics of a tribal organization, neither common leadership, concert of action, nor lands or territory inhabited in common, nor any property subject to common control. No beneficiary or group or band of beneficiaries has any voice in the handling of the trust property, and there is no other common property whatever.

(d) The purposes of the Act of 1889 as shown by its plain language, and also by the report of the committee which drafted it and reported it for passage—"to break up their tribal relationships and ownership in common"—are consistent only with an intent that, at the end of the fifty-year trust period, the distribution of the corpus per capita was to be made to individuals of the class described, wholly without regard to their membership in, or even the existence of, any tribe, band or tribal organization.

(e) The express provision of the Act of 1889, for what this court termed "a reserved power in Congress to make limited appropriations" from the trust corpus (the provision for Congressional appropriation of not

over 5% of the fund for "promoting self-support and civilization") discloses a clear realization and intent on the part of Congress that its ordinary plenary power to make any disposition of tribal property which it deems beneficial to the Indians did not extend to the trust funds arising under these agreements of cession.

(f) Cases such as *Lone Wolf vs. Hitchcock*, 187 U. S. 553; *Gritts vs. Fisher*, 224 U. S. 640; and *Sizemore vs. Brady*, 235 U. S. 441, sustaining the plenary power of Congress over admittedly tribal lands and property held in common, and in the course of distribution solely to the members as such of an existing and continuing tribe, have no application to the clearly defined rights of the ultimate beneficiaries of the trust created by the agreements of cession here involved.

III.

The withdrawals and disbursements from the permanent fund of which appellants complain were not authorized or contemplated by the agreements of cession creating the trust and violated the terms of the trust as defined in Section 7 of the Act of January 14, 1889. Certain of the withdrawals complained of were not authorized or attempted to be authorized by the terms of any subsequent Act of Congress and represent unlawful diversions of trust funds due to mere administrative errors without claim or color of justification under the plenary power of Congress.

IV.

A judgment for the amount of the unlawful diversions, which under the express terms of the Jurisdictional Act is to be credited to the trust funds here involved, will be in

accord with the ordinary duty of a trustee to restore to the trust portions of corpus unlawfully diverted, will result in substantial justice, and is the remedy expressly provided by the Special Jurisdictional Act.

ARGUMENT

I.

The Authority of Appellants to Maintain This Suit for Diversions of Principal.

In *Minnesota vs. Hitchcock*, 185 U. S. 373, after a review of the Act of January 14, 1889, this court said:

> "The cession was not to the United States absolutely, but in trust. * * * The trust was to be executed by the sale of the ceded lands, and a deposit of the proceeds in the Treasury of the United States to the credit of said Indians. * * * (etc., summarizing the provisions of the Act)."

The court further said in *United States vs. Mille Lac Chippewas*, 229 U. S. 498, that under the Act of 1889 the proceeds of the ceded lands were to be "placed in the treasury of the United States *as a trust fund*"; and that "the Indians, *no less than the United States*, were bound by the plain import of the language of the Act and the agreements."

Of the trust so created there were, under the plain provisions of Section 7 of the Act, two separate and distinct classes of beneficiaries, *i. e.*:

(1) A fluctuating class, embracing those from time to time entitled to share in annual distributions of interest during the fifty-year trust period, designated in Section 7 of the Act as "said Indians," and

(2) The ultimate "remaindermen" entitled to equal per capita distribution of the corpus of the trust—the "permanent fund"—at the end of the trust period, this class being described in Section 7 as "all of *said Chippewa Indians and their issue then living.*"

The qualifications of the income beneficiaries are of minor importance in this suit, where the claims relate to wrongful diversions of the principal, to the consequent damage of the second class of beneficiaries, *the remaindermen.*

As pointed out in the next subdivision of this brief it is the contention of appellants that whatever may be the answer to the mooted question of whether the interest beneficiaries are limited to persons who have maintained tribal affiliations, certainly eligibility to share in the ultimate distribution of principal is not dependent upon tribal or band membership or affiliation. However, in so far as the point now under consideration is concerned, all that is important is that there are two distinct classes of beneficiaries with different qualifications. Of those of "said Indians" included in the class of interest beneficiaries only those who survive to the termination of the trust will share in the principal distribution. Issue of members of the Chippewa bands in 1889 yet unborn and others who have never sustained or have abandoned all tribal affiliations will qualify to share in the final distribution, under the express definition of that class above quoted.

This was the situation with which Congress had to deal when it passed the Jurisdictional Act authorizing the litigation of rights and claims arising under the Act of 1889, and the subsequent amendments.

The original Jurisdictional Act of May 14, 1926 (44 Stat. 555) (H.R. 2), authorized the adjudication of all legal and "equitable claims of "the Chippewa Indians of Minnesota,"

without attempting to further define the class. In other words, the class authorized to sue was perhaps no broader than the class entitled to interest payments under the designation "said Indians."

By Act of June 18, 1934 (48 Stat. 979), Congress amended the Act expressly to include the remaindermen by providing:

> "In any such suit or suits the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in either the interest or in the final distribution of the permanent fund provided for by section 7 of the act of January 14, 1889 (25 Stat. 642), and the agreements entered into thereunder."

The motives of Congress in adopting this amendment are perhaps clear enough from the language used, but are rendered clearer by the reports of the house and senate committees recommending its adoption. The committee on Indian affairs of the house of representatives (H. R. Rep. No. 1325, 72nd Congress, 1st Session), in reporting on the bill H. R. 127, which became the Act of June 18, 1924 *(supra)*, adopted as its report the report of the senate committee recommending an identical bill (S. 3879), reading, in part, as follows (italics ours):

> "When the act of May 14, 1926 (41 Stat. 555), authorizing 'the Chippewa Indians of Minnesota' to sue in the Court of Claims became a law, the Interior Department then, and for many years theretofore, had construed the term 'the Chippewa Indians of Minnesota' as including all persons who were members of the different bands or tribes, at the time said agreements were entered into and their issue thereafter born, irrespective

of where born' (Op. Solicitor Mahaffie, dated February 17, 1919). Subsequent to the enactment of said act of May 14, 1926, the department changed its construction of the term 'the Chippewa Indians of Minnesota' so as to include *only those Indians, who, by living on or about the former reservations, have maintained tribal membership* (Op. Solicitor Patterson, dated January 8, 1927).

"If the term 'the Chippewa Indians of Minnesota' is confined to the Chippewa Tribe or to tribal members, as the Interior Department now insists, then it may well be said that this term, as used in the jurisdictional act of May 14, 1926, does not include all, *or possibly any*, of the class described in the agreements as 'said Chippewa Indians and their issue' who will be entitled, as remaindermen, to the principal of the fund at the expiration of the 50-year trust period. At the expiration of the 50-year trust period, the trust will come to an end and it is a serious question whether those then entitled to share in the final distribution will *or could have* any tribal status.

"The sole object of the bill is to make certain *that the claims of the remaindermen, that is that class described in the agreements as 'said Chippewa Indians and their issue,' are before the court for determination*, to the end that all claims which said Indians may have arising under or growing out of said act of January 14, 1889, and the agreements entered into thereunder, may be definitely and finally settled in the pending suits.

* * *

"Your committee is of the opinion that the bill should be adopted, so that there may be no doubt that all claims arising under or growing out of the act of

January 14, 1889 (25 Stat. L. 642), which the Chippewa Indians, *or any class thereof*, have, may, in the pending suits, be finally adjudicated and closed as intended by the original act."

We have, then, a complete trust, established by trust instruments (the Act and agreements) which completely define the duties of the trustee, and the rights of the beneficiaries. We also have the trustee, by the Jurisdictional Act, not only waiving its sovereign immunity, but expressly providing that, although the trust has not yet terminated, the ultimate distributees of the corpus of the trust shall be deemed in court at this time, "to make certain that the claims of the remaindermen, that is that class described in the agreements as 'said Chippewa Indians and their issue,' are before the court for determination" (Committee Report, *supra*).

In thus authorizing a representative suit by appellants to redress the wrongs of a class of ultimate distributees of a trust whose exact personnel is as yet undetermined, and in part unborn, Congress did not exceed what is ordinarily permitted in equity.

Thus Section 214, Comment (a), of Restatement of the Law of Trusts by the American Law Institute, after first stating the general rule that "if there are several beneficiaries of a trust, any beneficiary can maintain a suit against the trustee to enforce the duties of the trustee to him," contains the following comment:

> "If a beneficiary of a trust has not been born or conceived (see Sec. 112, Comment d), a suit can be maintained on his behalf by a next friend or guardian to enforce the duties of the trustee. Thus, if the trustee is threatening to destroy or dissipate the trust prop-

erty, a suit can be maintained on behalf of an unborn person designated as beneficiary to enjoin him from so doing.

"If the trustee has discretion to select as beneficiary any one or more members of a definite class of persons (see Sec. 120), any member of the class can maintain a suit against the trustee prior to such selection. Thus, if a trust is created for a person for life and on his death the trustee is directed to convey the property to such one or more of the children of the life beneficiary as the trustee may select and the trustee prior to the death of the life beneficiary threatens to dissipate the trust property, any one or more of the children can maintain a suit against the trustee to enjoin him from so doing."

The character of this suit as one to enforce the liabilities of a trustee of a still existing trust for diversions of corpus is further indicated by the provision of Section 10 (R. 5) of the Special Jurisdictional Act (44 Stat. 555), directing that any amount recovered be deposited in the Treasury of the United States, as funds standing to the credit of the Chippewa Indians of Minnesota, and bear interest, like the balance of the trust fund, at 5 per cent per annum. This is in substance a provision for the restoration to corpus of amounts wrongfully disbursed therefrom, and is further clear evidence of the nature of the issues Congress intended to be adjudicated herein.

It is submitted, therefore, that both the trustee *and the beneficiaries entitled to share in final distribution* are before the court for the enforcement of the equitable remedies available to such *cestui qui trustent* for unlawful diversions of trust property; that any losses suffered as a result of such

diversions by the ultimate distributees as a class are to be redressed in this action, and that for any such legal or equitable claim "arising or growing out of the Act of January 14, 1889, or any subsequent Act of Congress," plaintiffs are entitled to judgment; the proceeds of which will, under Section 10 of the Jurisdictional Act (44 Stat. 555), be credited to the principal fund above referred to.

II.

The "Permanent Fund" Was Not Subject to the Plenary Control of Congress.

The Court of Claims held that the agreements entered into between the United States and the twelve bands of Chippewa Indians located in Minnesota "did not create a contract" (R. 61), and held (R. 60):

> "The lands and funds of the various bands of Indians were tribal and subject to the plenary power and authority of Congress. This fact is indisputable."

Since, as pointed out above, the major portion of the diversions of the fund here complained of were effected in accordance with Acts of Congress authorizing or directing the diversions, this holding presents a major issue in the case.

The Court of Claims at several points in its opinion stresses its conclusions that in the enactment of what it terms "statutes similar to the Act of 1889," Congress did not surrender its plenary power over tribal lands ant property, and that if it be held that this was done by the agreements entered into under the Act of 1889 "it is the first time in the history of Indian legislation that this has been done" (R. 64).

The Act of 1889 *was* radically different from the ordinary Indian legislation. As we will endeavor to point out in this section of the brief, the plan proposed for acceptance by the Indians under the Act of 1889 *dealt with an unusual situation in an unusual way.* For this reason the Act and the agreements entered into under its authority, assenting to the plan proposed by the Act, and ceding the lands involved pursuant thereto, find no precedent in other Indian legislation, and were designed to, and did, create duties, rights and relationships entirely different from those contemplated or created by any other legislation relating to the disposition of Indian property or its proceeds.

The peculiar situation with which the Act of 1889 proposed to deal becomes apparent when we consider the state of the Indian titles upon which the Act proposed to operate.

As pointed out above, these Chippewa bands who had settled in Minnesota were part of the great Chippewa nation, which, without regard to state boundaries, originally had occupied an area from Lake Huron on the east and into the Dakotas on the west. The nation as a whole was originally recognized and treated with as a single tribal entity, vested with the common Indian title in, and entitled as a tribe to cede, all or any part of the vast area so held. In later treaties this great tribe was dealt with as divided into distinct and separate bands, each occupying and holding the exclusive Indian title to a separate area, and each recognized as "*entitled to hold or cede the same independently of the other bands or of the Chippewas as a whole*" (Opinion below, R. 64; *Chippewa Indians of Minnesota vs. United States*, 301 U. S. 358, at 360-1).

As to the separate and exclusive nature of the title held by each band, this court said in the last cited case (301 U. S. 358, 373):

"The recognition of a Chippewa band as having title to a reservation occupied by it was not confined to the Red Lake bands or to the Red Lake Reservation. On the contrary, it had long been the settled rule in respect of the Chippewa Indians in Minnesota that a band or bands occupying a separate reservation should be regarded and dealt with as having the full Indian title to the lands therein. The Indians both recognized and gave effect to the rule. Many cessions were negotiated and carried out in conformity with it. The band or bands occupying a reservation ceded it in whole or in part without any participation by other bands and received and enjoyed the compensation without sharing it with others. Under the rule each of the bands existing in 1889 had theretofore made cessions and received pay therefor quite independently of the other bands."

The subject matter with which the Act of 1889 proposed to deal was therefore the separate and exclusive titles in their respective reservations, held by each of the several bands "independently of the other bands, *and of the Chippewas as a whole.*" No Indian except a member of the band occupying a particular reservation had any right in that reservation, or to cede the same, or, if ceded, to participate in the proceeds thereof.

The areas and values of the various reservations thus separately held by these bands, and the membership of the various bands, varied widely. Thus the Red Lake Reservation contained 3,200,000 acres and was held by bands having a population of only about 1,100, or in the ratio of nearly 3,000 acres for each Indian in the bands holding the exclusive Indian title. The Red Lake and White Earth Reservations included timber of great value. Some reservations

included little or no timber. On the Mille Lac Reservation a band of 942 Indians held the Indian title to only 61,000 acres, or only slightly in excess of 60 acres for each individual (H. R. Report No. 789, 50th Congress, First Session, p. 2). The lands of the latter band would not have been sufficient to have made 80 acre allotments to all the band members. The other bands held reservations of varying areas and values between the above extremes (*id*).

Under the rule established in *Lone Wolf vs. Hitchcock*, 187 U. S. 553, Congress, in exercise of its plenary power, and regardless of the assent of the Indians, might have provided that the members of each band should be allotted on their own reservation and that the balance, if any, of that reservation should be disposed of and the proceeds administered as a trust fund exclusively for members of that band. This would, however, have resulted in tremendous accumulations for the members of more fortunately situated bands, while those holding the smaller and poorer reservations would have been left wholly dependent on the bounty of the government for support.

Of this situation Congress was fully aware. The report of the Committee of the House of Representatives which reported for passage the bill which became the Act of 1889 (H. R. Report No. 789, 50th Congress, First Session) discloses an intimate acquaintance with the situation, and describes the membership in the various bands, the areas in the various reservations and the character of the lands and timber therein. It criticizes other proposed legislation which would have given to the more fortunately situated bands the entire proceeds of their reservations and left the remaining Indians in a state of comparative poverty, and recognizes that the lands in question, though now separately held by the various bands, had been, at one time, the common prop-

erty of the Chippewa nation. Reciting these material facts, the Committee report in question (page 6) concludes with the following language:

"To carry out these general views your committee have prepared and introduced the accompanying bill (H. R. 7935) entitled 'A bill for the relief and civilization of the Chippewa Indians in Minnesota,' and recommend the passage of the same.

"*The bill is in the nature of a proposal to the Indians, and if not accepted by them is inoperative and nugatory.* If accepted and assented to by at least two-thirds of the male adults of each band, the bill, if passed, becomes effective. In brief, the bill, if accepted by the Indians, *aims to break up their tribal relations and make them full citizens,* to allot ample land to each of them in severalty, to dispose of the residue of the lands—the pine lands for the highest possible figure, the agricultural lands at $1 per acre to actual settlers under the homestead laws—and *to give all the Indians the entire benefit of the proceeds of the lands, less the necessary expenses, attending their survey, appraisal, and disposal.* As to details the bill itself speaks for itself, and is believed by your committee, fully and fairly, in a just and practical measure, to carry out the design of the general plan outlined as hereinbefore described."

It was pursuant to this report that the Act of 1889 was ultimately adopted, providing that all of the lands (save those required for allotments) on all of the reservations held by these bands, were to be ceded to the United States in trust for "all the Chippewa Indians in the state of Minnesota," under provisions whereby the interest of every Chippewa Indian in Minnesota in the commingled proceeds

of all the reservations was to be substantially equal to the interest of every other such Indian, without regard to the band to which he had belonged, or the area or the value of the reservation ceded by that band for the common benefit.

Thus the proposed arrangement disregarded entirely the former exclusive right and title of each of the separate bands in its own reservation; disregarded the fact that no band had any interest in any other reservation; and vested in the beneficiaries of the trust new interests entirely different and distinct from any pre-existing right held as members of any band or bands. For example, each of the 1,100 Indians who held the exclusive title to the Red Lake Reservation and ceded therefrom more than 3,200,000 acres was entitled to no greater per capita share in the common trust fund than each of the 1,100 members of the Leech Lake band who ceded to the trust a reservation embracing only 94,000 acres, or less than 1/32 as much (H. R. Report 789, 50th Congress, First Session, p. 2).

In still another respect, the Act of 1889 proposed to appropriate lands held by one band of Indians for the benefit of other bands who had no interest therein. The White Earth Reservation, in addition to large amounts of timber, embraced the best agricultural land held by any of the Chippewa bands—some of the best farming land in Minnesota. It had been reserved by treaty exclusively for, and was occupied and held solely by the White Earth bands. Yet the Act of 1889 gave to the members of all the other bands (except those at Red Lake, who were to be allotted on their own reservation) the right to be removed to White Earth, and to select individual allotments out of the White Earth Reservation (Act of January 14, 1889, 25 Stat. 642, Sec. 3, R. 37), the amount of any allotments previously made to White Earth Indians being deducted from the allotments

which such Indians were to receive under the new plan. Approximately 4,749 other Indians thus acquired the right to receive and hold, in individual allotments, lands previously held in common solely by the 1,169 members of the White Earth bands (H. R. Ex. Doc. 247, 51st Congress, 1st Session, summary of census, p. 9). By this provision, as well as by the provision for the pooling of the proceeds of all the ceded lands, the Act of 1889 proposed to "give the lands of one band * * * to another," a transaction which this court has held to be beyond the plenary power of Congress *(Chippewa Indians vs. United States, infra)*.

Congress did not assume to effect this radical change in existing rights merely through the exercise of its plenary power, but as its Committee said, submitted the plan "in the nature of a proposal to the Indians, which, if not accepted by them, is inoperative and nugatory." That the Act of 1889 does not represent an exercise of the plenary power was expressly held by this court in *U. S. vs. Mille Lac Chippewas*, 229 U. S. 498, at 506, where this court said:

> "A manifest purpose of the Act (of Jan. 14, 1889) was to bring about the removal to the White Earth Reservation of the scattered bands * * * and this was to be accomplished not through the exertion of the plenary power of Congress but through negotiations with and the assent of the Indians."

Not only did Congress *elect* not to use its plenary power to effect the results contemplated by the Act of 1889, but the result attained by the voluntary agreements of cession entered into between the United States and the separate bands *could not* have been attained by the exercise of such plenary power.

This conclusion we submit follows from a consideration

of the state of the Indian titles prior to the cessions under the Act of 1889, as above described, the result attained by those cessions and the decision of this court in *Chippewa Indians of Minnesota vs. United States* (Red Lake Band, intervenors), 301 U. S. 358.

If Congress had attempted, under its plenary power alone, to thus admit members of any of the bands to a share in the benefits of one of the reservations not occupied by them, without the separate consent of the separate band holding the Indian title to such reservation, such action would have been invalid. And this would have been true even if all the Indians except the band owning the reservation in question had unanimously approved and ratified the Act. Thus, in the case of *Chippewa Indians of Minnesota vs. United States (supra)*, Justice Van Devanter said (301 U. S., at 375):

> "Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations, and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own." Citing *Lane vs. Pueblo*, 249 U. S. 110; *U. S. vs. Creek Nation*, 295 U. S. 103, and *Shoshone Tribe vs. U. S.*, 297 U. S. 476.

Because of this rule, the court, in that case, held that the otherwise plain language of Section 1 of the Act of January 14, 1889, to the effect that "as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all of the Chippewa Indians in Minnesota," did not eliminate the necessity of a *separate* cession of the

Red Lake Reservation by the Red Lake bands, and that, *to save the Act from probable invalidity*, this provision must be construed to imply that as to the Red Lake Reservation "the cession was to be not only by two-thirds of the male adults of the bands occupying that reservation, but also by two-thirds of the male adults of all the Chippewa Indians in Minnesota." (301 U. S., at 376.)

In other words, the court held that Congress could not have authorized the cession of the Red Lake Reservation for the benefit of "all the Chippewas in Minnesota" save with the separate consent of the Red Lake bands as its exclusive owners. And as a result it was held that the extent of the cession of the Red Lake Reservation actually effected under the Act of 1889 was strictly limited by the express exception from the cession set forth in the agreement with the Red Lake bands (301 U. S., at 378), notwithstanding the broader language of cession as to that reservation contained in the other agreements signed, in strict accordance with the above quoted provision of the Act, by more than the required two-thirds of all the male adult Chippewas in Minnesota.

The title of the Red Lake bands in the Red Lake Reservation was no more exclusive than the right of each of the other bands in the reservation held by it. We therefore confidently assert that none of the reservations could have been appropriated to the uses and purposes contemplated by the Act of 1889 under the plenary power, or *without the assent of the band holding the separate title thereto.*

It has seemed to us worth while to make clear that the Act of January 14, 1889, exceeded the plenary power of Congress, and depended for its validity upon the assent of the Indians, because of the light which this throws upon

the nature of the beneficiary class as distinct from the pre-existing bands.

To illustrate this point we invite comparison with the situation presented in *Lone Wolf vs. Hitchcock*, 187 U. S. 553. In that case, the plenary power of Congress was held to authorize the appropriation by the United States of title to an Indian reservation upon the payment or setting apart *for the benefit of the tribe holding the communal Indian title*, of the sum of $2,000,000, and the making of individual allotments *to tribal members*. Before the legislation complained of, the tribe, as such, held tribal title to the reservation. After the legislation, the individual members of the tribe, as such members, had, or were entitled to, separate allotments, and there was set aside in the Treasury of the United States the sum of $2,000,000 "*for the benefit of the tribe*," this amount having been set apart as "the consideration for the surplus of the land over and above the allotments." This transaction the court characterized as follows:

> "In effect the action of Congress now complained of was but an exercise of such (plenary) power, *a mere change in the form of investment of Indian tribal property*."

Under the agreements of cession made pursuant to authority contained in the Act of January 14, 1889, the United States similarly acquired title to lands which were formerly the communal property of the separate bands of Indians. Allotments were to be made from these lands to individuals, and a trust fund was to be set up, including all the net proceeds received from the disposal of the lands. Thus far the transaction was substantially identical with that involved in the *Lone Wolf* case.

The distinction is found when we compare the beneficial provisions of the respective trusts. In the *Lone Wolf* case the beneficiary was the identical tribe which held the Indian title to the ceded reservation, and the trust fund was the consideration paid or the cession. The beneficiary of the trust and the owner of the land were identical, *i. e.*, the tribe and its members as such. In the *Chippewa* case the beneficiaries of the proceeds of each of the separately owned reservations were not limited to the band of Indians which formerly exclusively owned that reservation, nor to the members of that band, nor were they any known tribal entity, but "all the Chippewa Indians in the State of Minnesota," and (at the time of final distribution), "*their issue then living in equal shares.*"

If this class had been an Indian tribe holding a common tribal title to the several ceded reservations, the conditions of the *Lone Wolf* case would have been approximated. Here, in fact, each reservation was separately held by a separate band, and there was no tribe or tribal organization whose members had a common interest in all the ceded reservations. It is because the Act of 1889, in consequence, involved in substantial measure the taking of the lands of each of the bands and permitting persons not members of such band to share in the proceeds thereof, that, in *Chippewa Indians vs. Minnesota, supra*, the transaction was held to be beyond the plenary power of Congress.

We submit that the state of the Indian titles with which Congress proposed to deal, and the radical result which Congress sought to obtain, explain fully why Congress elected, in enacting the Act of 1889, to adopt a distinct departure from other Indian legislation. Here, to protect the poorer bands, Congress sought to have the proceeds of each reservation applied, not for the exclusive benefit of members of the

band which held the exclusive tribal title, but for a new, larger and different class including members of other bands who had no prior interest therein, and, ultimately, "all the Chippewa Indians in Minnesota and their issue."

We have seen that any such disposition of tribal property is beyond the plenary power, and must *depend for its validity upon the assent of each band* to the proposed disposition. This being true, *the only authorized disposition of such property, or its proceeds, is that so assented to, and the powers, rights and duties of the parties involved are necessarily definitely and permanently fixed and limited by the terms of that assent.* Unless a particular use or disposition of the ceded lands or their proceeds is in accordance with that assent, as expressed in the agreements it is, of necessity, unauthorized and unlawful.

It was as a result of this situation that this court, in *United States vs. Mille Lac Chippewas* (229 U. S., at 507), held that as to this transaction, "*the Indians, no less than the United States, were bound by the plain terms of the Act and the agreements.*"

No other Act of Congress in connection with Indian affairs ever involved a situation comparable to this, or attempted to deal with it in this manner. The Act of 1889, in this regard, is unique and *sui generis.*

Since the assent of each of the separate bands was necessary, and the authorized dispositions of the Chippewa lands and proceeds are limited to what was thus assented to, we now invite consideration of the question, "What did they assent to?" Did they, as the lower court held (R. 59) consent and agree to "a resumption of a tribal unit, always known as the Chippewa Indians of Minnesota—an abandonment of band organization and return to a tribal one"? Was it intended or contemplated by either party

that the "permanent fund" made up of the proceeds of the ceded lands should be subject to the unlimited plenary control of Congress?

Since each agreement with the several bands recited the reading, translation and explanation of the Act of 1889 to the Indians, and their acceptance and ratification thereof, and since each agreement ceded the particular reservation involved "for the purposes and upon the terms stated in the Act," we may properly look to the Act for an answer to this inquiry.

At the outset, the Act itself (Section 1, R. 36) necessarily directs negotiations with "all the *different bands and tribes* of Chippewa Indians in the State of Minnesota," and the cession, as to each reservation, is to be by the male adults of the band occupying the reservation. This, as we have seen, was exactly in accord with the true state of the Indian title, each band owning exclusively its separate lands, and no common tribe or unit having jurisdiction over the reservations as a whole.

It is important to note that after this meticulously correct provision for "the complete extinguishment of the Indian title" by separate cessions by the several bands of the Indian titles to their respective reservations, *the Act contains no further reference to any band or tribe.*

The money accruing from the disposal of the lands accrues, *not* to "all the *bands or tribes* of Chippewa Indians in Minnesota," from whom the cessions were to be taken, nor to the members of said bands as such, but (Section 7) is to be placed in the treasury to the credit of a class of persons described as "all the Chippewa Indians in the State of Minnesota."

The annuities out of the interest fund are payable "in equal shares per capita" to individuals described as "said

Indians"—not to any band or tribe, nor to members of any band or tribe as such.

As to the final distribution of the fund at the end of the fifty-year trust period, the class is expressly broadened by the provision for distribution, not to the then members of the ceding bands, nor even merely to "said Indians," but "to all of said Chippewa Indians *and their issue* then living, in cash, in equal shares."

Neither the class to whose credit the fund is to be placed ("all the Chippewa Indians in the State of Minnesota"), the class to whom interest payments are to be made ("said Indians") or the class of ultimate distributees or remaindermen who were to receive the corpus in equal shares at the end of the fifty-year trust period ("said Chippewa Indians and their issue then living") corresponds in any way to any Indian band, tribe or tribal entity previously recognized or known.

The Chippewa Indians "in Minnesota" formed only part of the Chippewa Nation, which knew no state boundaries and held sway from Lake Huron into the Dakotas. That portion of the nation happening to dwell in Minnesota had no separate tribal or other organization, and no right to speak for the nation as a whole.

The bands located in Minnesota were, as we have seen, separate entities, each with separate lands and a separate tribal organization, but with *no common tribal or other organization* of, or representing, the Chippewas in Minnesota as a whole, or entitled to cede any Indian lands in that state.

No law, treaty, agreement or executive order had ever recognized or purported to deal with these bands as a unit, or with any tribal organization equivalent to or approximating the classes of persons described in Section 7 of the Act

of 1889 as the persons entitled to share in distributions from the trust.

In this connection the Court of Claims in the original opinion below (R. 71) quotes the language of this court in the *Kadrie* case (281 U. S. 206, 208, discussed *infra*), as follows:

> "When the act of 1889 was passed, the Chippewa Indians in Minnesota comprised eleven bands or tribes occupying ten distinct reservations in that state in virtue of treaties or executive orders. Collectively they were regarded as a single tribe, and commonly called Chippewas of Minnesota."

The statement that "collectively they were regarded as a single tribe" does not indicate that they had ever been recognized as such, or that any such tribal organization existed. This is shown by the note appended to this statement by the court (281 U. S. 208), reading as follows:

> "These Indians formerly were part of the Chippewa or Ojibway Nation of the Great Lakes region. The Nation comprised many subordinate bands or tribes, some of which came to be permanently located in Canada and others in Michigan, Wisconsin, Minnesota, and perhaps other states. The bands or tribes which came to be seated in Minnesota *have latterly been designated as the Chippewas of Minnesota by way of distinguishing them from those seated elsewhere.* Treaties, September 24, 1819, 7 Stat. 203; June 16, 1820, 7 Stat. 206; August 5, 1926, 7 Stat. 290; July 29, 1837, 7 Stat. 536; October 4, 1842, 7 Stat. 591; February 22, 1855, 10 Stat. 1165; March 11, 1863, 12 Stat. 1249; October 2, 1863, 13 Stat. 667; May 7, 1864, 13 Stat. 693; March 19, 1867, 16 Stat. 719; House Doc., vol. 61, 59th Cong., 1st Sess., pp. 277-

280; History of Ojibway Nation, Copway, pp. 170-171; Minn. His. Soc. Cols., vol. 5, pp. 37-4 , 507-509; also vol. IX, pp. 55-56."

The treaties cited in this note were made, in each instance, either with the great Chippewa Nation as a whole, or with a separate band or bands "seated in Minnesota." This is shown by the following list of the treaties cited by the court:

Treaty of September 24, 1819 (7 Stat. 203), made at Saginaw, Michigan, with "*the Chippewa Nation of Indians.*"

Treaty of June 16, 1820 (7 Stat. 206), made at Sault Ste. Marie, Michigan, with "*the Chippewa tribe.*"

Treaty of August 5, 1826 (7 Stat. 290), made at Fond du Lac, Minnesota, with "*the Chippewa tribe.*"

Treaty of July 29, 1837 (7 Stat. 536), made at St. Peters, Wisconsin, with "*the Chippewa Nation.*"

Treaty of October 4, 1842 (7 Stat. 591), made at La Point, Wisconsin, with "*the Chippewa Indians of Mississippi and Lake Superior*" (ceding an area of lands in both Minnesota and Wisconsin).

Treaty of February 22, 1855 (10 Stat. 1165), made at Washington, D. C., with "chiefs and delegates representing the *Mississippi, Pillager and Lake Winnibigoshish bands* of Chippewa Indians" (ceding areas in Minnesota occupied by said separate bands).

Treaty of March 11, 1863 (12 Stat. 1249), made at Washington, with the parties to above 1855 treaty and amending same.

Treaty of October 2, 1863 (13 Stat. 667), made at Red Lake, Minnesota, with the *Red Lake and Pembina (Minnesota) bands*, ceding part of their separate reservation.

Treaty of May 7, 1864 (13 Stat. 693), made at Washing-

ton, with the *Red Lake and Pembina bands,* consenting to an amendment of above (1863) treaty.

Treaty of March 19, 1867 (16 Stat. 719), made at Washington, with chiefs of the *Mississippi bands,* ceding portions of lands reserved to those bands in prior treaties.

An examination of the record of the government's dealings with these Indians prior to 1889 discloses no treaty, agreement, law or executive order which treated or dealt with the Chippewa bands in Minnesota as a tribe or unit. The most that can be said of the situation is the statement in the note above quoted that the bands seated in Minnesota were sometimes designated as the Chippewas of Minnesota "by way of distinguishing them from those seated elsewhere." *No common tribal organization of the Minnesota Chippewas had been recognized or existed.*

In the court below, defendant frankly conceded that if the trust beneficiaries were a tribal entity, they were a *new* tribal entity. Thus in defendant's brief (R. 151 in Court of Claims), the government's position is stated:

> "The defendant contends that the Chippewa Indians of Minnesota were tribal Indians at the time of the passage of the act of January 14, 1889, that since the passage of that act they, *as a new entity,* have remained tribal Indians, and that their property is tribal property, and, therefore, is and at all times has been subject to the plenary control of Congress."

Again counsel for defendant said, in their brief below (R. 166, Court of Claims):

> "Under the act of 1889 the various bands and tribes were united and became a new tribal entity."

As we have seen, the beneficiaries of the trust were so

different from the tribal units effecting the cession that the proposed arrangement was not one which could have been effected under the plenary power. Does any provision of the Act or agreements warrant a conclusion that the beneficiaries were to form or constitute a *new tribal entity?*

No better definition of the traditional Indian tribe or band has been found than that embraced in *Montoya vs. United States*, 180 U. S. 261, where the court said:

> "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a 'band,' a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design. While a 'band' does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a 'band' within the meaning of the act it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership, and concert of action."

Tested by this definition, the non-tribal character of the class designated as beneficiaries of the trust arising under the Act of January 14, 1889, becomes apparent. No common government or leadership existed as to "all the Chippewa Indians in Minnesota," nor was any provided for. Except for portions reserved for individual separate allotments, the "particular territory inhabited" by these Indians was ceded to the United States under cessions expressly providing that upon their approval by the President, the Indian title

should be deemed "completely extinguished." The several organizations of the separate Minnesota bands, although not immediately dissolved, retained no jurisdiction or control over any part of the permanent fund of "all the Chippewa Indians in Minnesota." No provision was made by the Act of 1889 for any government, leadership, unity of action, or control by any Indian organization over these funds. No portion of these funds is ever payable to any Indian organization but solely to persons of the class described. Tribal property "belongs to the tribe as a community, not to the members severally or as tenants in common." (*Gritts vs. Fisher*, 224 U. S. 640.) Here no group or class has any right as such to control or receive any part of the fund. The only beneficial rights are those of individual members of the designated classes to receive equal per capita payments.

In addition, *it was the avowed intent of the Act of 1889 to end the tribal status of these Indians.*

Thus the committee on Indian affairs of the house of representatives, reporting for passage the bill which became the Act of January 14, 1889, said (H. R. Rep. No. 789, 50th Congress, 1st Session, p. 5) (italics ours):

> "It is now conceded on all hands that the only safe and practical way to civilize the Indians is by allotting lands in severalty to them—*breaking up their tribal relationships* and ownership in common, and putting them to work *as individuals* on their several allotments. * * * To carry out these general views your committee have prepared and introduced the accompanying bill (H. R. 7935), entitled: 'A bill for the relief and civilization of the Chippewa Indians in Minnesota.' * * * In brief, the bill, if accepted by the Indians, aims *to break up their tribal relationships and make them full citizens.* * * *"

The Court of Claims in its opinion herein said (R. 56):

> "It is sufficient for the purposes of this case to state that Congress in enacting the act clearly intended to put in effect the Government's prevailing Indian policy, *i. e., secure the dissolution of the various Indian Bands and Tribes involved*, allot them lands in severalty, dispose of surplus lands for their benefit, and otherwise seek to civilize the Indians themselves."

The same legislative intent was found by this court, the court saying in *Wilbur vs. United States ex rel. Kadrie*, 281 U. S. 206, 208-9:

> "The Act of 1889 was directed to accomplishing their transition from existing tribal relation, and dependent wardship to full individual emancipation and its incident rights and responsibilities and *to that end* the Act made provision for obtaining a cession of all their tribal lands * * * and for selling the ceded lands, and creating with the net proceeds an interest bearing fund. * * *"

While the court correctly remarks later in that opinion that the contemplated transition from a tribal to an emancipated status was to be "gradual rather than immediate," it is certainly to be assumed that Congress having stripped the bands of all their common title to the reservations where they existed, and of all control over the proceeds of this property, contemplated that in the half century provided to intervene before distribution was made, a large part, if not all, of the individual beneficiaries would be persons who had attained "full individual emancipation and its incident rights and responsibilities," and were no longer affiliated with any tribe or band. Surely Congress did not intend that the ultimate distribution to individuals, in cash, of the pro-

ceeds of their entire Indian heritage, was to be limited to beneficiaries who had retained membership in one of the tribal organizations whose termination was one of the objects of the Act. A provision limiting the distributees of the principal to tribal members would, of course, have forced the Indians to maintain tribal organizations and tribal membership to avoid the loss to themselves and their children of their respective shares in the property to which they were entitled, and the avowed intent would have been frustrated. Certainly no such intention is to be implied.

The Act studiously avoids any mention of any requirement of past or present tribal membership as a condition to membership in the class of persons entitled to share in the final distribution, and defines the class so broadly as to clearly exclude any such requirement. The class so entitled to equal per capita shares is made up of those "then living" of (1) "said Chippewa Indians," *i. e.*, those persons who made up the original bands, and (2) "their issue," *an all-inclusive term having nothing to do with tribal membership or band affiliation.*

Finally, it is submitted that Congress evidenced its complete realization that the Act contemplated the creation of rights in the corpus of the fund not subject to its plenary administrative control over tribal property, by its provision for what Justice Van Devanter accurately describes *(supra)* as "a *reserved* power in Congress to make *limited* appropriations from the fund during the fifty-year period for the purpose of promoting civilization and self-support among the Indians."

Under this provision, the power is reserved in Congress, "in its discretion, from time to time * * * to appropriate, for the purpose of promoting civilization and self-support among said Indians, a portion of said principal sum not ex-

ceeding five per centum thereof."

If this fund was tribal in character, subject to "the full administrative power possessed by Congress over Indian tribal property" *(Lone Wolf vs. Hitchcock, supra)*, and if Congress was, in consequence, free to "pursue any course with regard thereto which, to it, seemed better for the Indians" *(Sizemore vs. Brady*, 235 U. S. 441), then, of course, no such "reserved power" was necessary. If this fund is tribal, Congress had unlimited power. It could have appropriated the entire fund for their civilization, support, education, or any other Indian purpose, without restraint or limitation. If this be so, this "reserved power to make limited appropriations" was a superfluous and inoperative provision, calculated only to deceive the Indians into a false belief that they and the government had agreed to a valid restriction on this power.

No such intent is to be assumed. The Act must be construed so as to render this limitation purposeful and effective. The fact that Congress believed it necessary to reserve, and the Indians to grant, this limited power is consistent only with a deliberate intent to create non-tribal rights, free from the general unlimited plenary power over tribal assets, and a realization that without this provision Congress could not lawfully divert any part of the principal.

It is submitted that the Act is replete with evidence that Congress accurately knew and appreciated the state of the prior Indian title, and, *desiring and intending to terminate all tribal relations*, made the provisions above discussed for distribution of the proceeds to a new class or entity having no tribal characteristics, and embodied these provisions in binding agreements, upon which the entire validity of the transaction depends.

There remain for consideration the cases principally relied on by the court below in arriving at its conclusion as to the tribal nature of the trust funds here involved. These cases include *Wilbur vs. United States ex rel. Kadrie*, 281 U. S. 206; *Gritts vs. Fisher*, 224 U. S. 640, and *Sizemore vs. Brady*, 235 U. S. 441.

The first of these involved an application by Sarah Kadrie, a duly enrolled member of the White Earth band of Chippewa Indians of Minnesota, for the enrollment of certain of her children *as members of the class entitled to share in the annual distribution of interest* from the trust funds.

As appears from the opinion (281 U. S. 212-213) Sarah Kadrie had married a naturalized citizen of the United States in 1909. Of her nine children, the first four were born in Canada and others at International Falls and St. Paul, Minnesota, so that as the court says (281 U. S. 213): "While all of the relators have a minor fraction of Chippewa blood, they were born of parents having no tribal relations then or since, and have lived only in white communities."

The first three of the children were nevertheless placed on the interest rolls when born, as "issue" of an enrolled Chippewa Indian. In 1916, however, the Indian Bureau refused to enroll the fourth child, and cancelled the prior enrollment of the first three, on the theory that, under the general rule applicable to tribal property, the offspring of a marriage between an Indian woman and a white man are not entitled to share in annuities or other benefits as Indians.

In 1919, the then Secretary of the Interior, following an opinion given by the solicitor for that Department, reversed the 1916 ruling and directed that all the children then born be enrolled as entitled to annuities.

In 1927, a succeeding Secretary of the Interior, adopting

and applying an opinion given by a succeeding solicitor, held that none of these children were entitled to share in the interest annuities.

It will be noted that from 1890, when the agreements entered into under the Act of 1889 became effective, to 1915, when the enrollment of the Kadrie children was cancelled, and again from 1919 to 1927, the Indian Bureau apparently ruled that all "issue" of members of the Chippewa bands, as they existed prior to 1889, were entitled to share in the interest benefits of the trust without regard to tribal membership or affiliation. It was only from 1916 to 1919, and again after 1927, that the Secretary regarded tribal membership as important, *even as to the interest annuitants.* The final ruling (1927) as to effect that the interest annuitants were limited to tribal members came only after this suit was commenced.

To review the action of the Department taken in 1927 in striking the Kadrie children from the rolls, an action in mandamus was instituted against the Secretary of the Interior to compel their restoration.

In that proceeding the Court of Appeals of the District of Columbia directed the issuance of a writ requiring the Secretary to restore the names of the Kadrie children to the interest payment rolls. The Court of Appeals said (30 Fed. (2d) 989):

> "Referring again to the provisions of Section 7 relative to the disposition of the funds 'placed in the treasury of the United States to the credit of all the Chippewa Indians, in the State of Minnesota, as a permanent fund' it is apparent that when the fund was so deposited this limitation was not carried into the division of the permanent fund, since it is provided that it 'shall be

divided and paid to all said Chippewa Indians and their issue then living.' This comprehends all the issue, direct and lineal, of the Chippewa Indians living in Minnesota in 1889, wherever living or wherever located. The inducement to sever the tribal relation and establish the habits of civilization as afforded by the statutes, was accorded by Congress without requiring that residence should be confined to the State of Minnesota. Consequently, no limitation in that respect appears in the act. It, therefore, becomes immaterial whether the children of Sarah Kadrie were born in Canada or in Syria, so long as she retained her citizenship in the United States.

"We think a reasonable interpretation of the intent of Congress justifies the extension of the privilege of this act to the lineal descendants of the Chippewa Indians, recognized as such at the time of the passage of the act of 1889, * * *. We think the expression 'and their issue then living' includes all of the issue, and, therefore, should be extended to the relators."

It will be noted that the Court of Appeals made no distinction whatever between the interest beneficiaries and the ultimate distributees of the fund and held that in neither instance was tribal membership or affiliation essential to participation.

From this decision the Secretary petitioned this court for review by certiorari. In his petition for certiorari the Attorney General, appearing for the Secretary of the Interior, *did not question the correctness of the conclusion of the Court of Appeals that the ultimate distributees of the corpus of the fund at the end of the trust period were not limited to tribal members*, but did contend that the interest

beneficiaries, described in the Act of 1889 only as "said Indians," were limited to persons who had maintained tribal relations. Thus, in the petition for certiorari in that case, the Attorney General says:

> "Section 7 of the Act of January 14, 1889, contains *two distinct provisions* relative to the proceeds of the sale of the tribal lands of the Chippewa Indians in the State of Minnesota, now held *as a trust fund* in the Treasury of the United States. One of those provisions relates to the disposition of the income derived from the fund while it is held in trust. The other provision relates to the disposition of the fund itself at the expiration of the fifty-year period fixed by the statute.
>
> "With respect to the income of the fund, it is provided that during the fifty-year trust period one-half of the interest derived from the fund shall be paid annually to the heads of families and the guardians of orphan minors for their use; that one-fourth of the interest shall be paid in equal shares per capita to all other classes of the said Indians; while the balance of the annual interest is to be used for the purposes of Indian schools.
>
> "It is plain, therefore, that in order to entitle any person to share in the income derived from the trust fund, a satisfactory showing must be made that he or she belongs to some of the above groups or classes of Chippewa Indians in the State of Minnesota, as contemplated by the Act.
>
> "With respect to the *final disposition* of the fund at the expiration of the fifty-year trust period, *the provisions of the Act are much broader*. It is provided that at the expiration of the said fifty years the permanent

fund shall be divided and paid to all of said Chippewa Indians and *their issue* then living, in cash, in equal shares. The distinction is obvious. * * *

"When the fund finally is released from the trust at the expiration of the fifty-year period, a different situation arises, and a different provision for its disposition is made by the statute. *It is then, at the end of said fifty-year trust period, and not until then, that the 'issue' then living of the tribal Chippewa Indians contemplated by the statute become entitled to participate in the distribution of the fund.*

"It was the failure to recognize this distinction which led the Court of Appeals of the District of Columbia into error."

The decision of this court reversing the decision of the Court of Appeals of the District, did not go to the merits, the holding being based upon the conclusion that mandamus was not a proper remedy to review the determination of the Secretary as to the qualifications of interest beneficiaries. Thus this court said:

"Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."

Following this statement, the court says:

> "The only question open in this proceeding is whether the decision of 1927 was given in the discharge of a ministerial duty controllable by mandamus or of a duty requiring the exercise of judgment or discretion not thus controllable."

The court then determined that the decision of the Secretary was given in the performance of a duty requiring the exercise of judgment or discretion not controllable by mandamus, saying:

> "The questions mooted before the Secretary and decided by him were whether the fund is a tribal fund, whether the tribe is still existing, and whether the distribution of the annuities is to be confined to members of the tribe, with exceptions not including the relators. These are all questions of law, the solution of which requires a construction of the act of 1889 and other related acts. A reading of these acts shows that they fall short of plainly requiring that any of the questions be answered in the negative and that in some aspects they give color to the affirmative answers of the Secretary. That the construction of the acts in so far as they have a bearing on the first and third questions is sufficiently uncertain to involve the exercise of judgment and discretion is rather plain. The second question is more easily answered, for not only does the act of 1889 show very plainly that the purpose was to accomplish a gradual rather than an immediate transition from the tribal relation and dependent wardship to full emancipation and individual responsibility, but Congress in many later acts—some near the time of the decision in question—has recognized the continued ex-

istence of the tribe. This recognition was respected by the Secretary, and is not open to question here."

In a concluding paragraph of the opinion (281 U. S. 222), the court says:

"The time fixed for the final distribution is as yet so remote that no one is now in a position to ask special relief or direction respecting that distribution."

We believe we are justified in assuming from this opinion that the court would have similarly disposed of an application for mandamus to reverse the earlier holding to the effect that the interest annuities were payable to enrolled Chippewas and their issue, without regard to tribal membership.

With reference to the remark by this court to the effect that later Acts of Congress recognized the continued existence of "the tribe," attention is invited to the fact that the thirteen bands which constituted the so-called "tribe" were the settlors, not the beneficiaries of the trust, the ultimate beneficiaries being "all said Chippewa Indians and their issue then living." We think it will be conceded that the character of the plaintiffs' funds as tribal or non-tribal, and the right of Congress to control the same in the exercise of its plenary power, became fixed and determined as of the effective date of the agreements entered into under the Act of 1889, whereby the Indians expressed their assent to, and carefully defined, the disposition to be made of their lands, and the proceeds thereof. If the funds and the rights of the beneficiaries as described and provided for in those agreements were not *then*, under the terms of the agreements, tribal and subject to the plenary power of Congress, certainly Congress could not by the mere later recognition of the continuance of the tribal status of the bands with which

it had dealt (and whose tribal titles had, by the express terms of the Act, been "completely extinguished" in 1890), change the terms of the assent given by the Indians, or the character of the funds set up as provided in the agreements, and thus render them subject to its plenary control.

We submit that the net result of litigation, which culminated by the decision of this court in the *Kadrie* case, is a holding by this court (1) that the ruling by the Secretary of the Interior that *the interest annuities* should be confined to persons who had maintained tribal relations, was not so clearly wrong that it could be controlled by mandamus, and (2) *that the question of whether the final distributees were confined to tribal members was not before the court.*

The conclusion of the Court of Appeals of the District that these ultimate distributees were not tribal or confined to members of any tribe or band was not questioned by the Secretary or the Attorney General on the appeal to this court, and was not criticized or passed upon by this court in any manner. While the judgment of that court was reversed because of its misconception of the scope of the remedy of mandamus, its conclusion as to the non-tribal character of the class entitled to share in final distribution—"said Chippewa Indians, and their issue then living"—remains as the opinion of the highest court which has passed on the merits of this question.

In *Gritts vs. Fisher*, 224 U. S. 640, the legislation considered by the court dealt with lands described by the court as "belonging to the tribe as a community, and not to the members severally or as tenants in common." It had been conveyed to "The Cherokee Nation" by patent. The original Act looking toward its distribution (Act of July 1, 1902, 32 Stat. 725) provided for allotments to each "citizen" of the tribe as of September 1, 1902, and expressly excluded all

children born thereafter from participation in "the tribal property." The Act further provided for the termination of the tribal government on March 4, 1906, and the distribution of "*tribal funds*" *to enrolled members of the identical tribe* which held the tribal title. The Act expressly provided (Section 31) that no person not enrolled should be entitled to "participate in the distribution of the common property of the tribe." Thus under the express language of the Act the property and rights dealt with, including the *right to receive shares on final distribution*, were expressly and admittedly tribal, and depended on tribal membership.

On March 4, 1906, the rolls as of September 1, 1902, had not been completed. Some enrollees had not selected allotments, and some allotments already made were involved in litigation. Further, "the tribal council of the Cherokees had requested that children born after September 1, 1902, and prior to March 4, 1906, be admitted to participate in the allotment and distribution of *tribal lands and money*" (224 U. S., at 645). Therefore, on March 2, 1906, Congress, by joint resolution provided that the tribal government should be continued until all tribal property should be distributed to individual members and then by Act of April 26, 1906 (34 Stat. 37), as amended June 21, 1906 (34 Stat. 325, 341, c. 3504), in compliance with the request of the tribal council, expressly authorized participation by all children born into the tribe prior to March 4, 1906, and authorized the enrollment of such children as tribal members.

Appellants, who had been enrolled in 1902, contended that the Act of 1906, in including children born after September 1, 1902, arbitrarily took from persons enrolled as of September 1, 1902, rights vested in them by the earlier Act, taking property which was theirs, and giving it to others.

In *Cherokee Intermarriage Cases*, 203 U. S. 76, 93, the

Act of 1902 had been held by the court to have none of the elements of an agreement, pointing out that "a majority of the native Cherokees voted against its acceptance," and that "it is only an Act of Congress and can have no greater effect."

On this state of the record the court in *Gritts vs. Fisher* held that the Act of 1902 created no vested individual rights in the undistributed tribal property, and sustained the Act of 1906 on grounds stated on page 648 of the opinion as follows:

> *"The difficulty with appellant's contention is that it treats of the Act of 1902 as a contract when it is only an Act of Congress and can have no greater effect.* * * *. It was but an exertion of the administrative control of the government over the *tribal property of tribal Indians*, and was subject to change by Congress at any time *before it was carried into effect*, and while the tribal relations continued. * * * *The council of the tribe asked that this be done* and we entertain no doubt that Congress in acceding to the request was well within its power."

The court further says in the concluding sentence of the opinion:

> "It is not to be overlooked that those for whose benefit the change was made in 1906 were *not strangers to the tribe* but were children born into it while the tribe was still in existence, and *while there was still tribal property* whereby they could be put on an equal or substantially equal plane with other members."

Sizemore vs. Brady, 235 U. S. 440, involved a similar situation. The lands and funds involved were those of the Creek nation. Of them the court says (p. 441):

"Anterior to the legislation which we must consider the Creek lands and funds belonged *to the tribe as a community*, and not to the members severally or as tenants in common."

The legislation considered was Act of March 1, 1901 (31 Stat. 861, c. 676), called the "Original Creek Agreement." That Act provided for the allotment of "*all lands of said tribe* (with certain exceptions for townsites, schools, etc.) *among citizens of said tribe*" (Sec. 3, Act of March 1, 1901) with appropriate regard for their value. As the court says, the Act further provided (Sec. 27) for using tribal funds in equalizing allotments, and *for distributing what remained* to citizens of the Creek nation.

The Act in question was, therefore, one merely providing for the prompt distribution of all tribal property solely to tribal members. There was no indication that any but tribal Indians should share in the fund, no provision for the transfer of the tribal title to the United States or anyone else prior to distribution, nor any provision indicating that the purely tribal title and ownership in common should be changed or impaired in any way, until distributed to individual members.

The Act as originally passed provided that all "citizens" of the tribe should be enrolled as of April 1, 1899, and that as to any citizen dying after that date and before distribution to him, his share should be allotted and distributed to "his heirs according to the laws of descent and distribution of the Creek nation." By an amendment of the original Act adopted May 27, 1902 (32 Stat. 258), and ratified by the tribe, this provision was repealed and it was provided that any such decedent's share should go to his heirs under Arkansas law.

A "citizen" of the tribe having died on March 1, 1901, and no distribution having been made to his heirs prior to the amendment of 1902, the question was as to whether the heirs under Creek or Arkansas law took his still undistributed share of the tribal property. The court merely held that in providing for the orderly distribution of this tribal property to tribal Indians, Congress did not divest it of its tribal character except as the transaction was consummated by actual individual distributions. Thus the court says:

> "There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them *as tribal property*. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe, or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement but remained the same thereafter as before, save *that rights created by carrying the agreement into effect could not be devested or impaired*. *Choate vs. Trapp*, 224 U. S. 665, 671, 56 L. ed. 941, 944, 32 Sup. Ct. Rep. 565."

In consequence the court concluded that Congress was empowered to make the amendment and the Arkansas heirs prevailed.

In both *Gritts vs. Fisher* and *Sizemore vs. Brady* the entire transaction was one carried out solely under the plenary power. Neither act is sustained as an agreement assented to by the Indians but solely as "an Act of Congress" with no greater effect. Each Act involved in these cases was an appropriate exercise of that administrative plenary power because it merely provided, under reasonable rules and regulations, for the distribution of tribal assets solely to members, as such, of the one tribe which in each instance held the common Indian title. There was not involved in either case any question of admitting other tribes or bands to the benefits of reservations held exclusively by the Cherokee or Creek nations—no such "giving of the lands of one band or tribe to another" as was effected under the Chippewa Act of January 14, 1889, and which required, as this court held, the assent of each band.

Since, in the cases cited, Congress was thus merely exercising its plenary administrative control over tribal property, it could, so long as the property remained tribal—(*i. e.*, except as portions were actually distributed so that the common tribal title thereto was replaced by non-tribal rights)—continue to exercise its plenary control over the undistributed common tribal estate, and might change and modify the rules governing its distribution.

We have no quarrel with this result. But we submit that these decisions cannot be invoked to sustain the contention that Congress retained plenary control over the common proceeds of the separate reservations ceded by the various Minnesota bands under the Act of 1889 for the express purpose of "breaking up tribal relationships and ownership in

common," where the agreement and assent of the Indians was necessary to the validity of what was done and where those agreements provided for the ultimate distribution of those proceeds to "said Chippewa Indians and their issue then living," a class of individuals wholly different from the ceding tribal units and having no tribal characteristics whatever, and not confined to tribal members.

Attention is invited to the fact that even under the rules announced in *Gritts vs. Fisher* and *Sizemore vs. Brady* the exercise of the plenary power is carefully and expressly limited to situations where there was still tribal property for distribution, and that "*rights created by carrying the agreements into effect could not be devested or impaired*" (*Sizemore vs. Brady, supra*). Thus a Creek Indian to whom an allotment had already been made, and for whom the allotted lands were held by the United States under trust patent, could not have been deprived thereof under the plenary power.

We respectfully urge that when the President on March 4, 1890, approved the Chippewa agreements of cession, which thereupon operated "as a complete extinguishment of the Indian title without any other act or ceremony whatever" (Sec. 1, Act of January 24, 1889, R. 37), the transaction contemplated by the Act of 1889 was "carried into effect," and that the rights of members of the non-tribal class designated to ultimately receive the proceeds of the distribution of the ceded lands were no longer subject to impairment under the plenary power of Congress over tribal property.

One further argument advanced by the government before the Court of Claims should be dealt with before leaving the discussion of the construction of the Act of 1889 and of the intent of the parties to the agreements entered into "for the purposes and upon the terms stated in that Act." It was

urged below that the circumstances of the Indians were such that neither the government nor the Indians could have intended that the proceeds of the ceded lands be placed beyond the power of Congress to expend the same as it saw fit in connection with these Indians and their affairs.

This argument was advanced although there can be no claim that any of the provisions of Section 7 of the Act governing the disposition of the funds during the trust period are ambiguous or uncertain, or require construction. Section 7 of the Act (R. 40) clearly permitted invasions of the "permanent fund" only for (1) reimbursement and deductions for expenses incurred by the government in carrying out the Act, (2) reimbursement to the government for the advances of interest contemplated by the Act, and (3) the disbursement of not more than 5% of the total fund under the "reserved power to make limited appropriations" for the purpose of "promoting self-support and civilization." None of these provisions being ambiguous or susceptible of different meanings, there is no occasion to resort to the circumstances of the parties as an aid to construction.

Moreover, if the circumstances be resorted to, they fail to sustain the position taken. If the fund had been handled as proposed, the interest and "support and civilization" provisions would have been ample.

During the negotiations which culminated in the agreements in question, the Commissioners advised the Indians that the pine lands alone, without regard to the proceeds of the agricultural land, were estimated to "reach in value from 25 to 50 millions of dollars" (Report of Commissioners negotiating the agreements under the Act of January 14, 1889, to the Secretary of the Interior dated December 26, 1889, H. R. Ex. Doc. 247, 51st Congress, First Session, page 7). *This would have produced interest available for the*

education and support of these Indians in an amount exceeding $1,250,000 annually.

While this forecast proved excessive, the total credits to the fund totalled $17,662,325.70 (Finding 13, R. 47). The first substantial withdrawals from the fund occurred in 1911, when defendant reimbursed itself for its interest advances (Finding 8, R. 43), for its expenses in carrying out the Act ($328,163.95), and for other expenditures of kinds not contemplated by the Act in the sum of more than $2,000,000 (Finding 9, R. 45). Thereafter, substantial expenditures were made directly from the fund itself, the details of which appear in Finding 19 (R. 53).

During the entire period from 1890 to 1927, the withdrawals made from the fund which were of the kinds contemplated under Section 7 of the Act of 1889 did not total more than $2,500,000 made up approximately as follows:

(1) That part of the 1911 reimbursement which represented items properly chargeable to the expense of carrying out the Act of 1889 (Finding 9, R. 46)	$ 328,163.95
(2) That part of the 1911 reimbursement for advance interest which was properly taken from the permanent fund (Findings 7 and 8, R. 43-4)	664,235.72
(3) Later withdrawals for items charged as expenses in carrying out the Act of 1889 (Finding 19, R. 53)	669,696.34
Total	$1,662,006.01

Deducting this total of authorized reimbursements for advance interest and for expenses in carrying out the Act, from the total credits to the fund ($17,662,325.70) leaves

almost exactly $16,000,000 as the net principal of the fund. Of this amount, Congress was authorized to expend not more than 5%, or $800,000, "for promoting self-support and civilization," which, when added to the above $1,662,006.01 for expenses and advance interest, would bring the total of all reimbursements and expenditures which were in fact made, and which under Section 7 of the Act of 1889 were to be withdrawn from principal, to $2,462,006.01.

This amount deducted from $17,662,325.70 of principal credited to the fund would have left a principal fund of over $15,000,000 drawing interest at 5%, or $750,000 a year, and would have provided a total of $12,000,000 in interest payments alone during a sixteen-year period without any invasion whatever of principal.

During the sixteen-year period from 1912 to 1927, inclusive, the actual disbursements from principal were only $8,455,022.19 (Finding 19, R. 33). The last quoted figure included $669,606.34 which, as above indicated, was expended by the defendant in carrying out the provisions of the Act of 1889, and already deducted from the principal of the fund in the above computation. Of the balance so disbursed, $800,000 was available for disbursement under the "reserved power to make limited appropriations" to the extent of 5% of the principal, and has likewise been already deducted as above indicated. Deducting these items which were authorized under the provisions of Section 7 of the Act of 1889, from the total disbursements of $8,455,002.19, we have less than $7,000,000 as the total expended during the sixteen-year period for purposes not contemplated by the Act of 1889. This is the total which Congress deemed necessary to spend out of the principal fund for these Indians, although it apparently believed that it possessed full plenary power to expend any part of the fund for any Indian purpose. Dur-

ing the same period the permanent fund in fact averaged less than $5,000,000 (Tabulation, Finding 15, R. 50), and hence at 5% yielded less than $250,000 per annum in distributable interest, or less than $4,000,000 in interest for the sixteen-year period. Adding this to the $7,000,000 expended out of principal during the same period by Congress under its assumed plenary power, we have $11,000,000. As we have seen, the fund, if administered in strict accordance with the trust, would have produced over $12,000,000 in interest alone during the sixteen years.

We have, then, this situation. The bands of Chippewa Indians in 1889 held their reservations, but derived substantially no income therefrom. It was estimated that the disposal of the lands would produce a fund sufficient to yield $1,250,000 per year in interest to provide for the education and support of the Indians. The disposal of the lands actually yielded enough so that if the fund had been administered in accordance with the agreements, it would have produced $750,000 per year in interest, or in a sixteen-year period approximately $12,000,000.

During the sixteen-year period from 1912 to 1927, inclusive, the total distributions from principal which were not contemplated by the Act of 1889 and the agreements, and which were made by Congress under the assumption that it had complete plenary power, totalled less than $7,000,000, and the actual interest accruing was less than $4,000,000.

If it were true that the Act of 1889 and the agreements were to any extent ambiguous as to the authorized disbursements from the "permanent fund" so that extraneous evidence might be resorted to as an aid to construction, certainly we would be justified in resorting to what was said between the parties at the time the agreements were being negotiated. Very extensive reports of the council meetings

which resulted in these agreements appear in H. R. Ex. Doc. No. 247, 51st Cong., First Session (Corg. Doc. Ser. No. 2747). This officially printed public document consists of the message from the President transmitting the approved agreements to Congress with the report of the Secretary of the Interior to the President as to the negotiation of the agreements and the report of the Commissioners appointed to negotiate the agreements, together with stenographic reports of the councils which they held. From this document it appears that H. M. Rice, Chairman of the Commission, addressing the Third Council held at Red Lake on July 3, 1889, said to the Indians:

> "The second thing is, that the rest of the land which is now being used up, stolen from you, or burnt off will be taken hold of by the Great Father for his children. He will sell your pine at the highest price he can get for it, and he will hold that money for fifty years and pay you the interest yearly. At the end of that time he will divide that principal sum among you and your children. The Great Father would be willing to give you that money at once if you could only make good use of it, but he hopes that after fifty years your children will be able to receive the money and do well with it."
>
> H. R. Ex. Doc. 247, *supra*, page 71.

Surely no inference is to be gathered from this language that the major part of the fund was to be subject to be disbursed for the support of Indians during the fifty-year trust period.

Again addressing the First Council at White Earth Reservation, Mr. Rice said:

> "At the end of fifty years the principal is to be divid-

ed equally among those who shall be then living. To provide for the breaking of land, building of houses, purchasing of cattle and horses, and everything of that kind that you may need for your advancement, there is a clause providing that Congress may, in its discretion, from time to time during the said fifty years appropriate for the purpose of promoting civilization and self-support among the Indians a portion of said principal sum, not exceeding 5 per cent thereof. In case of the failure of crops or any unforeseen misfortune here is a storehouse of money to be drawn upon for your wants."

H. R. Ex. Doc. 247, *supra*, page 88.

Here again there is no question of the distribution of principal until the end of the trust period. It is to the "reserved power to make limited appropriations" that Commissioner Rice refers as affording a means for combatting "failure of crops or any unforeseen misfortune."

The idea of the Indians as to the meaning of the Act and agreements in this regard was well expressed by the old Chief Wob-On-Ah-Quod at the Ninth Council at White Earth when, in the course of a long address explanatory of the Act, he said:

"I am on the brink of the grave, and I leave this as a legacy to you. It is, as it were, my last will and testament. * * * Many of you who are listening to me will not see the end of the fifty years mentioned in the bill, but those who are then alive will see the benefits that will accrue from this agreement. Those we leave behind us will see those benefits, but many that I see will fall before that time. So we can only bear in mind that we have done our best for our posterity."

H. R. Ex. Doc. 247, *supra*, page 116.

Throughout the entire negotiations, the idea is implicit that the proceeds of the disposal of the ceded lands were to constitute a "*permanent* fund," to inure at the end of the trust period to "posterity."

We again urge that the Act of 1889 and the agreements which ratified and accepted that Act are wholly free from ambiguity as to the disposition to be made of the so-called "permanent fund."

However, if resort to surrounding circumstances and negotiations is made, we submit that there is nothing in this record to indicate that either the Indians or the government, at the time the agreements were entered into, had any reason to believe that the annual interest, plus the distributions under the "reserved power to make limited appropriations" would be insufficient for their care and support. The Court of Claims well said (R. 59):

> "Doubtless it was the belief of Congress that the income from the fund that was to be disbursed to the Indians annually during the fifty-year period would be sufficient, along with their individual landed estates, to maintain them, and at the same time would encourage the adoption of the ways of the Whites for themselves and future generations."

We submit further that the negotiations clearly indicate that each party regarded the "permanent fund" as a thing to remain intact for posterity. The idea that this fund was subject to be dissipated in per capita payments to individuals during the life of the trust, or that Congress might elect to pay from this principal such items as the cost of the operation of its Indian service in Minnesota, finds no support whatever either in the Act itself, the agreements of cession; the circumstances of the Indians, or the interpretation

placed upon the Act by the Commissioners and chiefs who conducted the negotiations.

III.

The Claims Asserted.

Specific dispositions of portions of the "permanent fund," for purposes not authorized by the terms of the agreements of cession, are summarized in the "Statement of the Case," *supra*.

If these constitute "unlawful" dispositions of this trust fund, judgment for the amount so "unlawfully appropriated or disposed of" is expressly authorized and directed by Section 4 of the Special Jurisdictional Act (R. 34), and the amount recovered is to be dealt with like the balance of the trust corpus (Sec. 10, *id.*, R. 5).

As to these dispositions of the fund the court below clearly recognized (R. 58) that "the defendant has depleted the trust fund by various disbursements to the Indians * * * *for purposes not mentioned in the Act of 1889 and contrary to the terms of the alleged trust agreement.*" Recovery, as to the major items, was denied below solely on the ground that these disbursements were made pursuant to appropriations by Congress, in the exercise of its plenary power over tribal properties, and hence these diversions of the trust principal, though admittedly "*contrary to the terms of the trust*," were not "*unlawful*."

Conversely, the Court of Claims also clearly recognized that, if this plenary power did not extend to the "permanent fund" created under the Act of 1889, recovery should be had, saying (R. 68):

> "As previously stated, the plaintiffs' case rests upon a lack of Congressional authority to take from the funds

created by the act of 1889 any sum not expressly stated to be reimbursable. If this is the principle of established law, manifestly the plaintiffs are entitled to recover."

The question of whether the plenary power of Congress extended to the principal fund here involved has been discussed. This section of the argument will be confined to a consideration of the classes of disbursements from the "permanent fund" which were authorized by the agreements of cession, and a discussion of some of the unauthorized purposes for which the "permanent fund" was in fact dissipated.

A. *Dispositions of the Trust Fund Authorized by the Agreements of Cession.*

As we have seen, the terms of the trust as to the disposition of the "permanent fund" are set forth and clearly defined in Section 7 of the Act of January 14, 1889, which (with the balance of that Act) was expressly made a part of each agreement with the Indians. Section 7 appears in full in the petition (R. 11), in the findings below (R. 40), and appears again in full in the opinion of the Court of Claims (R. 57), and need not be again reprinted here. Its clear provisions may be outlined as follows:

A fund, repeatedly referred to as a "permanent fund," is to be created by the deposit in the Treasury of the United States "to the credit of the Chippewa Indians in the state of Minnesota" of the proceeds of the disposal of all the ceded lands. This fund is to draw interest at the rate of five per cent per annum. The interest is to be expended annually, one-fourth for a system of Indian schools, and three-

fourths in annual per capita distributions to "said Indians."

The cash proceeds of the lands constitute the corpus of the trust—the "permanent fund"—and are to be applied as follows:

A. There are to be "*deducted*" from the proceeds of the disposal of the ceded lands before they are placed in the "permanent fund" certain specified expenses, *i. e.*:

(1) Expenses of "*making the census*" (referring to the classified census and roll of the Indians provided for in Section 1 of the Act).

(2) Expenses of "*obtaining the cession and relinquishment*" (referring to securing from the Indians the agreements of cession above referred to).

(3) Expenses of "*making the removal and allotments*" (referring to the removal of Indians from ceded lands to the unceded part of the White Earth Reservation, and making individual allotments to all the Indians as per Section 3 of the Act).

(4) Expenses of "*completing the surveys and appraisals*" (referring to the surveys and appraisals required by Section 4 of the Act as a preliminary to classification and sale of the ceded lands).

B. "Congress may in its discretion from time to time during said period of fifty years appropriate for the purpose of promoting civilization and self-support among said Indians, a portion of said principal sum not exceeding five per centum thereof."

C. "Whenever said permanent fund shall exceed

three million dollars, the United States shall be fully reimbursed, out of such excess for:

(1) "all the *advances of interest made as herein contemplated*, and

(2) "other expenses *hereunder*."

The "advances of interest *made as herein contemplated*," and for which defendant was entitled to reimbursement under C (1), *supra*, are defined and limited in the section in the following language:

> "The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually * * * until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed three million dollars, *less any actual interest that may in the meantime accrue from accumulations of said permanent fund*."

The trust is to continue for "the period of fifty years after the allotments provided for in the Act have been made" and "at the expiration of said fifty years, said permanent fund shall be divided and paid to *all of said Chippewa Indians and their issue then living in equal shares*."

As we have seen the entire transaction depended upon the assent of each of the ceding bands for its validity. Under the complete and unambiguous language of Section 7 the only dispositions of the "permanent fund" authorized by the agreements of cession—the only dispositions of that fund to which the necessary assent of the ceding bands was ever given—may be simply classified as:

(1) Expenditures made in carrying out the Act.

(2) Reimbursement for interest advanced "as herein contemplated."

(3) Expenditures not exceeding 5% of the fund made pursuant to the "reserved power to make limited appropriations" for "promoting civilization and self-support."

(4) Ultimate per capita distribution at the end of the trust period to "said Chippewa Indians and their issue then living."

B. *Excess Reimbursement for Advance Interest.*

As above stated Section 7 authorized the defendant, whenever the fund exceeded $3,000,000, to reimburse itself out of the trust fund for its "advances of interest *made as herein contemplated.*"

The advances "herein contemplated" were limited to "ninety thousand dollars annually * * * *less any actual interest that may in the meantime accrue from accumulations of said permanent fund.*"

The obvious intent of these provisions was that the principal or "permanent" fund should be reduced only to the extent that the total interest distribution effected under this provision during any year exceeded the interest accruing during that year. So far as interest accrued, it was to be applied to reduce the amount advanced, and only the excess was chargeable to principal.

Appropriations of $90,000 per year for advance interest were made by Congress for each of the years 1891 to 1911, inclusive (Finding 7, R. 44) under appropriating acts providing in substance that expenditures thereunder "shall be repaid into the Treasury of the United States in accordance with the provisions of the Act of January 14, 1889" (Opinion below, R. 66).

These appropriations totalled $1,890,000. The total amount disbursed as advance interest pursuant thereto was $1,860,079.85. *The total amount of "actual interest in the meantime accruing" on the permanent fund was $2,048,348.76* (Finding 7, R. 44; tabulation, omitting fiscal year 1912).

During every year after 1904 the actual interest accruing exceeded the amount disbursed as advance interest, but during each of the years 1891 to 1904, inclusive, the disbursements of advance interest exceeded the actual interest accruing. During those years the advances aggregated $999,134.02, while the total of the accruals of actual interest during the same years was $334,898 (Finding 7, R. 44). In consequence, *the total amount so disbursed during those years exceeded the corresponding accruals by $664,236.02.* This is the maximum amount authorized to be charged to the principal fund.

Defendant kept the accounts of this trust in two separate funds, one known as "Chippewas in Minnesota Fund," which was the interest bearing "permanent fund"—the principal or corpus of the trust—and the other designated as "Interest on Chippewas in Minnesota Fund," to which the interest actually accruing was credited (Finding 6, R. 43).

In 1911 defendant's officers, in attempted compliance with the direction contained in the appropriating acts above referred to, assumed to cause the interest advances to be "repaid into the Treasury of the United States in accordance with the provisions of the Act of January 14, 1889." As pointed out above, the actual interest accruals to that date amounted to over $2,000,000, and exceeded the total amount disbursed as advanced interest to that date. It was apparently realized that the interest fund should stand at least part of the reimbursement, and as a result, in effecting re-

imbursement for the $1,860,000 expended as advance interest, *the sum of $896,246.93 was taken from the "Chippewas in Minnesota" or permanent fund,* and the balance from the interest fund (Finding 8, R. 45).

Since, as above indicated, the provisions of the Act of January 14, 1889, authorized advance interest reimbursement out of principal only to the extent that advances of interest exceeded the actual accruals of interest, and the total amount of this excess was only $664,236.02 *(supra)* the withdrawal from the permanent fund of $896,246.93, *resulted in an unauthorized depletion of that fund in the sum of $232,010.91.*

It is to be noted that, for this unauthorized disposition of the "permanent fund," the claimed defense based upon the exercise of the plenary power of Congress is not available. Congress had ordered reimbursement only in accordance with the provisions of the Act of January 14, 1889. The wrongful diversion was apparently due to an administrative error, resulting in the reimbursement from the principal fund, of $232,010.91, which should have come from the interest fund.

Of this situation the Court of Claims says (R. 67):

> "Obviously, if Congress had been aware of the extent of interest accumulations it could have omitted these advance appropriations at least eight years sooner.
>
> "While technically it may be asserted that Congress did not strictly observe the provisions of the Act of 1889, it is indisputable that *the present plaintiffs suffered absolutely no loss.*"

It is true that the interest fund benefited by this error to the same extent as the "permanent fund" suffered. But the interest fund was, as the Act provided, distributed

annually three-fourths in per capita payments to then living Indians, and the balance for schools. It accrued, and has been distributed, solely for the benefit of the then interest beneficiaries, *the class entitled to share in the income of the trust.*

As to this claim, defendant is, therefore, in the position of a trustee who has mistaken principal for income, and has, in consequence, erroneously distributed, to the class entitled to receive only current distributions of net income, property which should have been conserved for those entitled to receive the corpus on the termination of the trust.

In a duly authorized representative suit, brought in behalf of the latter class, to compel the restoration to principal of sums thus unlawfully distributed, the trustee cannot, during the life of the trust, defend upon the sole ground that possibly some of the beneficiaries of his error may, by survivorship, become entitled to participate in the final distribution. While the trust continues, the amounts unlawfully distributed belong in the trust, and it is the trustee's duty to restore them. See Subdivision III of this brief *(infra)* as to appellants' right to this remedy.

C. *Reimbursement for Expenses Not Connected with Carrying Out Act of 1889; Agency Expenses.*

Finding No. 9 (R. 45) reads as follows (italics added):

"In each of the years 1890 and 1892 to 1910, inclusive, Congress made appropriations out of public funds in the total sum of $2,350,559. The purpose was stated in the following (or comparable) words: *'To enable the Secretary of the Interior to carry out* an Act entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota, and for

other purposes," approved January 14, 1889.' Each of the appropriation acts directed that expenditures thereunder should be reimbursed to the United States 'from the proceeds of sales of land ceded by the Chippewa Indians under the act (of 1889)' or 'out of the proceeds of sale of their lands.' These appropriations were carried to the account entitled 'Relief and Civilization of Chippewas in Minnesota (Reimbursable).'

During the fiscal years 1891 to 1913, inclusive, expenditures in the total sum of $2,338,625.32 were made *under authority of the Secretary of the Interior* for the use and benefit of these Indians. Included in the total were expenditures amounting to $328,163.95 made for expenses of the Chippewa Commission; for surveying, allotting sale, etc., of lands; for expenses, care, and sale of timber; for removals; for transportation, etc., of supplies; for councils and delegations, and for examining and appraising land. The balance of the total sum, amounting to $2,010,461.37, was expended for education, roads, bridges, clothing, provisions and other rations, agricultural implements and equipments, work and stock animals, feed and care of livestock, hardware, glass, oils and paints, medical attention, Indian houses, household equipment, fuel and light, hospitals and equipment, pay of mechanics, miscellaneous employees, agricultural aid, miscellaneous agency expenses, agency buildings and repairs, saw and grist mills, miscellaneous building material, pay of farmers, burial of Indians, care of indigent Indians, telephone lines, boats, docks, etc., per capita cash payments, pay of agents and subagents, pay and expenses of Indian police, and annual celebration of the White Earth band.

Reimbursement for all these expenditures was taken

from the 'Chippewas in Minnesota Fund,' as follows: On May 16, 1911, $2,196,036.63; on June 11, 1912, $139,550.59, and on May 26, 1913, $3,241.27, making a total of $2,338,828.49."

The amounts expended for these various purposes appear in Finding No. 10 (R. 46). By Section 7 of the Act of January 14, 1889, defendant was authorized to deduct from the proceeds of the disposal of the lands "all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals in this act provided," and was further authorized to reimburse itself out of that part of the fund in excess of $3,000,000.00 for "All the advances of interest made as herein contemplated and other expenses hereunder."

It will be noted that the expenses for which reimbursement was authorized are carefully confined to expenses incurred *in carrying out the provisions of the Act of January 14, 1889.*

That this was the exact intent of Congress is evidenced not only by this plain language, but also by the report of the house committee reporting this bill for passage (H. R. Rep. No. 789, 50th Congress, 1st Session, p. 6) in which one of the objects of the bill is stated to be "to give all the Indians the *entire* benefit of the proceeds of the lands, *less the necessary expenses attending their survey, appraisal and disposal.*" (Italics ours.)

As stated in Finding 9 *(supra)* the appropriating acts here involved recognized this limitation and appropriated these funds "to enable the Secretary of the Interior to carry out" the Act of 1889.

Appellants do not question the right of the United States

to reimburse itself out of the "permanent fund" for $328,783.95 thus expended for the expenses of the Chippewa Commission and for the survey, appraisal and disposal of the ceded lands. These are expenses in carrying out the Act, which were authorized charges against the fund. The balance, having no connection with such expenses, was improper.

As to this claim, appellants rely not only upon the plain limitation in Sec. 7 of the Act of 1889, but upon the rule well stated in *"Digest of Decisions of Second Comptroller of the Treasury"* (1884-1893), Vol. 3, p. 187, as follows (italics ours):

> "Where Indian lands were ceded to the United States to be surveyed and sold as other public lands are surveyed and sold, the proceeds of such sales as they accrue, after deducting *all expenses incident to the proper execution of the trust*, to be deposited to the credit of said Indians: HELD that the United States was entitled to reimbursement for any and all expenses incurred in excess of amount that would have been necessary had no Indian lands been sold; that *it was incumbent upon the trustee through its officers to keep a separate account of expenses incurred by reason of the sale of Indian lands*, so that the exact amount of such expenses could have been ascertained without resort to computation based on probabilities more or less uncertain; that where this had not been done it was not the fault of the Indians, and that *if reasonable doubts arise as to the proper expenses to be charged to them, said doubts must be resolved in their favor.*"

This statement by the comptroller merely applies to the United States, when acting as trustee for its dependent

Indian wards, the same measure of responsibility and the same duties which would be imposed by a court of equity upon a private trustee.

Let us examine one or two of the larger items involved.

Under these appropriations made by Congress "To enable the Secretary of the Interior to carry out" the Act of 1889, large sums were expended for *education* and reimbursement was taken therefor from the "permanent fund." This item has no possible relation to any expense connected with the making of the census, obtaining the cessions, effecting the removals, making the allotments, completing the surveys and appraisals or any other expense of the defendant involved in the disposal of the ceded land or the administration of the resulting trust. In addition, as we have seen, Section 7 of the Act of January 14, 1889, contained express provision for education by providing that one-fourth of the interest on the trust fund should be devoted to the establishment and maintenance of a system of free schools among the Indians and for their benefit.

Out of moneys similarly appropriated the defendant *maintained its Minnesota Indian agencies, and in 1911 reimbursed itself therefor out of the permanent fund*, as shown by the following items for which reimbursement was taken (Finding No. 9, *supra*):

Agency buildings and repairs.
Pay of agents and subagents.
Pay and expenses of Indian police.
Pay of mechanics.
Miscellaneous employees.
Miscellaneous agency expenses.

These agencies did not have their origin with the Act of January 14, 1889, nor any substantial connection with it.

They were the long established instrumentalities of the government maintained at its own expense for the care of its Indian wards and the preservation of peace and order among them, and between them and their white neighbors.

The court will judicially notice that Indian Agencies had their origin in the forts and garrisons maintained by the War Department to control the Indians. Later the armed forces were succeeded by Indian Agencies but the Indian Agents remained Army Officers under the direction of the Secretary of War, and it was not until 1900 that defendant discontinued the policy of assigning Army Officers as Indian Agents.

This was the situation when these Indian bands were induced to cede their respective separate reservations for purposes carefully defined and limited in the Act of 1889 under agreements, binding on both the United States and the Indians, by which the United States agreed to effect the disposal of the lands, giving the Indians "the entire benefit of the proceeds of the lands less only the necessary expenses attending their survey, appraisal and disposal."

The Court of Claims says (Opinion R. 69):

> "In 1911 Congress adopted the policy of defraying the expense of Indian agencies and other costs of governmental activities in Indian affairs, either in whole or in part, out of available Indian tribal funds. In this case Congress observed this policy and provided that sums expended for this purpose should be reimbursable. The plaintiffs contest the item by a contention predicated upon governmental policy obtaining in former years. We will not review the origin and purpose of Indian agencies; it is sufficient to state that Congress determines the Indian policy and we may not challenge it."

Thus the propriety of these reimbursements is sustained not upon any claim that the reimbursements in question represented items properly reimbursable under the terms of the trust, but solely upon the plenary power of Congress.

The question of whether this power applies at all to this fund has been discussed, *supra*. In addition, as shown by the Finding quoted, the appropriating Acts here involved did not purport to vary the terms of that Act. This money was expended "under authority of the Secretary of the Interior," pursuant to Acts of Congress which, in strict accordance with the agreements, appropriated the money so spent "*to enable the Secretary of the Interior to carry out*" *the Act of 1889*.

Even if the plenary power were applicable to these diversions of the trust fund, we suggest that the plenary power over tribal property is one which, theoretically at least, is to be exercised for the benefit of the Indians, and does not permit Congress, even when dealing with admittedly tribal property, to wholly disregard the rights of the Indians, or to deal with it as its own. *United States vs. Mille Lac Band*, 229 U. S. 498; *Lane vs. Pueblo*, 249 U. S. 110; *U. S. vs. Creek Nation*, 295 U. S. 103; *Chippewa Indians vs. U. S.*, 301 U. S., at 375. This being true we urge that even if the plenary power applied to this fund, Congress was without authority, in 1911, after entering into the solemn and binding agreements here involved, to effect the sudden change in policy described by the Court of Claims, and to elect to defray the expense of its own long established Indian Service out of the Chippewa "permanent fund." This was no act of guardianship. It was *a deliberate appropriation of Indian funds to pay a governmental expense*, a proceeding consistent only with absolute ownership.

Except for the item of $328,163.95 above mentioned, none

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of the expenses reimbursed as shown in Findings 9 and 10 (R. 45-6), bear any possible relation to defendant's expenses under the Act of 1889. The position of the court below on this entire claim is as follows (R. 68):

> "The Act of 1889 contained certain provisions which obligated the Government to provide sufficient funds for administering the act, and for these sums the Government was to be reimbursed. Obviously, no additional legislation was required to authorize such reimbursements. The sums for which the Government took reimbursement, in addition to these, were appropriations made by Congress concerning the welfare and civilization of the tribe and providing that they should be reimbursed for the same.
>
> The plaintiffs seek to limit this item to one expenditure for carrying out the Act of 1889 and object to treating the reimbursable items as a whole. This position is untenable. Congress retained its plenary power and authority over Indian tribal lands and funds and provided that the sums appropriated were to be reimbursed from the Indian funds. See Finding 9. * * *
>
> As previously stated, the plaintiffs' case rests upon a lack of Congressional authority to take from the funds created by the Act of 1889 any sum not expressly stated to be reimbursable. If this is the principle of established law, manifestly the plaintiffs are entitled to recover."

D. *Appropriations for Promoting Civilization and Self-support in Excess of 5% of Principal Fund.*

As pointed out above, Section 7 of the Act of January 14, 1889, contains the following provision:

> "Congress may, in its discretion, from time to time during said period of 50 years, appropriate for the purpose of promoting civilization and self-support among said Indians, a portion of said principal sum not exceeding 5 per centum thereof."

The appropriations actually made by Congress out of the principal fund for this purpose vastly exceed, in total, 5% of the principal fund, and the sole question presented under this claim is as to the construction of the above provision of the Act.

It is the position of appellants that the total appropriations and withdrawals authorized by the above provision *during the entire trust period* were limited to a total not exceeding 5% of the permanent fund.

It was the apparent understanding of the Department of the Interior that the clause should be so construed as to permit appropriations *in each fiscal year* to an amount not exceeding 5% of the balance in the fund at the beginning of the year, or as if there were inserted, in the limiting portion, the words "in any fiscal year" so that it would authorize an appropriation of "a portion of said principal sum not exceeding *in any fiscal year* 5 per centum thereof." (See Tables in Finding 15, R. 49 showing that, while a total of $2,754,500 was appropriated by Congress under the clause, the total expended in any fiscal year did not exceed 5% of the fund as the same existed at the beginning of the year.)

Evidently appreciating that there was no basis for this insertion in the plain language of the statute, the position taken by counsel for the United States before the Court of Claims, abandoned the "fiscal year" theory and contended that the 5 per centum limitation merely means that "each appropriation, made 'from time to time' should not exceed 5 per cent of the principal fund" (Defendant's Brief in Court of Claims, p. 197).

Holding, as it did, that Congress had full plenary power to expend these funds as it saw fit, with the result, as pointed out above, that this "reserved power in Congress to make limited appropriations" becomes a wholly meaningless surplusage, the court below did not resolve this controversy, but sustained all expenditures under appropriations for "promoting civilization and self-support" as legitimate exercises of this plenary power.

It is respectfully submitted that to hold that the proviso in question permitted either successive annual appropriations of 5% each (resulting in the possible exhaustion of this 50 year trust fund in 20 years) or successive appropriations of 5% each, made as fast as Congress could pass them, does violence to the obvious intent of both the United States and the Indian.

If it had been intended that the appropriations were to be 5% *per year* it would have been easy to have said so. There is not the slightest basis in the Act or the agreements for this construction.

If it had been intended that appropriations might be made as fast as the necessary legislation could be passed, so that, conceivably, the entire fund might have been exhausted in six months, then there is no conceivable reason why each act should have been limited to 5% of the fund.

Section 7 itself repeatedly refers to the principal trust

fund as a "*permanent fund.*" It is provided that the proceeds of the disposal of the ceded lands shall be placed in the Treasury to the credit of the Indians "as a *permanent fund*"; that the "interest and *permanent fund* shall be expended for the benefit of said Indians in the manner following"; that at the end of said 50 years "said *permanent fund* shall be divided and paid to all of said Chippewa Indians and their issue then living"; that interest shall be advanced by the government until "said *permanent fund*" reaches $3,000,000; that such advances of interest shall be reduced by the interest actually accruing "from accumulations of said *permanent fund*," and reimbursement for expenses of carrying out the Act is authorized "whenever said *permanent fund* shall exceed the sum of $3,000,000."

Any such construction as is now contended for by the United States does violence to any characterization of this fund as a "permanent fund" and to the entire theory of the Act under which, as we have seen, the Indians were to undergo a process of civilization for a period of fifty years, during which those from time to time in being were to receive the income from the fund, and at the end of the fifty-year trust period, when the process of civilization and disruption of tribal life and relationships was expected to be more or less complete, the survivors and the surviving issue of the Indians were to receive as their own the corpus of the trust.

In the negotiations with the Indians which led to the signing of the agreements of cession, the commissioners appointed by the President under the Act of 1889 explained this clause in the following language:

> "There is a clause providing that Congress may, in its discretion, from time to time during the said fifty years, appropriate for the purpose of promoting civilization and self-support among the Indians, a portion of

said principal sum not exceeding 5% thereof. *In case of the failure of crops or any unforeseen misfortune, here is a storehouse of money to be drawn upon for your wants*" (H. R. Ex. Doc. 247, 51st Congress, 1st Session, p. 88).

It is respectfully submitted that there is no reason for so construing the clause as to subject to the discretion of Congress, during the entire trust period, more than the amount expressly stated in the Act itself, *i. e.*, "a portion of said principal sum not exceeding 5 per centum thereof."

The total of all credits to the fund was, as above stated, $17,662,325.70 (Finding 13, R. 47). If the "five per centum" is to be calculated on this total, then the maximum total amount authorized to be withdrawn from the fund under appropriations "for promoting self-support and civilization" was $883,116.29.

The amount actually so withdrawn was $2,526,267.64 (Finding 15, R. 49).

As above indicated, certain expenses under the Act of 1889, under the express language of Section 7, were to be "deducted" before the funds were established as a permanent fund, and a more nearly correct figure to which to apply the 5% is close to $16,000,000, with a resulting authorized maximum to be withdrawn under such appropriations of about $800,000.

Whether the authorized maximum be $800,000 or $883,000 need not be here determined. The larger figure was exceeded by more than a million and a half dollars, and the "permanent fund," to which the ultimate distributees are entitled, was to that extent reduced.

This excess having been "unlawfully disposed of" in violation of the terms of the trust, judgment therefor is expressly

authorized by Section 4 of the Jurisdictional Act (R. 34), and will be restored to the trust corpus under Section 10 of that Act.

E. *Miscellaneous Unauthorized Disbursements.*

In Finding No. 17 (R. 51) appears a list of miscellaneous disbursements which the Court of Claims expressly finds to be "amounts disbursed by defendant from said 'Chippewas in Minnesota Fund' other than amounts disbursed therefrom for purposes authorized by said Act of January 14, 1889." These disbursements total $2,311,493.19.

While it does not appear from the finding, it should be stated that the amounts disbursed as shown by Finding 17 and here discussed were, for the most part, disbursed under "civilization and self-support" appropriations made under the "reserved power to make limited appropriations" for that purpose to the extent of 5% of the fund. In consequence, if plaintiffs' position as stated in the preceding subdivision is sustained, the claims here asserted may be disregarded. They become important only if it be held that what this court called a "reserved power to make limited appropriations" was in effect unlimited except as restricted to what might be properly expended "for promoting civilization and self-support." Appellants claim that a substantial part of these disbursements were not within this class.

For example, these expenditures include, as in the case of the reimbursement discussed, *supra*, the expense of operating defendant's Indian service in Minnesota, an administrative governmental activity of long standing, which, prior to 1911, was financed, like other expenses of government, out of public funds. Agency expenses so paid out of the "permanent fund" include:

Indian agency buildings and repairs	$ 10,869.61
Miscellaneous agency expense	44,453.10
Miscellaneous agency employees	358,383.63
Pay of agency mechanics	86,975.66
Pay of Indian police	342.40
Total agency expense	$501,024.40

Such expenses are not within the "civilization and self-support" provision.

In this connection, attention is invited to a decision of the Comptroller of the Treasury appearing in Volume XIX, Decisions of Comptroller of the Treasury (1912-13), pages 39-40. The Act of June 21, 1906 (34 Stat. 325), provided that the proceeds of the sale of Coeur d'Alene Indian lands should be deposited in Treasury "to be expended for their benefit under the discretion of the Secretary of the Interior *in the education and improvement of said Indians*, and in the purchase of cattle, horses, harness, wagons, mowing machines and other agricultural implements for issue to said Indians, and also for the purchase of materials for *the construction of houses and other necessary buildings*, and a reasonable sum may also be expended by the Secretary *in his discretion* for the *comfort, benefit and improvement of said Indians*." The Comptroller was asked whether these funds could be expended (1) for agency buildings and (2) for administration expenses. The Comptroller held:

> "These items would tend to show that the benefit contemplated by the foregoing Act is the *exclusive and direct* benefit of the Indians as distinguished from *the more remote and* general benefit resulting to them from the establishment and maintenance of an agency and the administration thereof.

> "These moneys *belong to the Indians* and *are not to be charged with expenses of administration*, and that portion of the Act which provides 'for the purchase of material for the erection of houses or other necessary buildings' has reference to houses or other necessary buildings for the Indians, and not buildings for Agency administrative purposes."

If such agency administrative expenses are not payable under authority to expend Indian funds for the "education and improvement" and for the "comfort, benefit and improvement" of the Indians, certainly they are not so payable under an authority to appropriate for "civilization and self-support," particularly where that provision had been represented to the Indians as one to be called upon "in case of failure of crops or other unforeseen misfortune", (address of Commissioner to Indians, *supra*).

In determining for what purposes expenditures might be made under this provision, every doubt should be resolved in favor of the Indians. See Volume XXI, Decisions of the Comptroller of the Treasury, 1914-1915, page 393, where the applicable rule is stated as follows:

> "No law should be construed as authorizing an expenditure from an Indian trust fund if it will reasonably admit of any other construction. Any doubt as to whether such an expenditure is authorized should be resolved in favor of the fund and against the expenditure."

These expenditures described in Finding 17 further include $439,000 expended from the principal fund for "education"; $140,000 more for "payments to the Minnesota public school system for tuition for Chippewa children," and $43,000 paid therefrom to the Minnesota public school sys-

tem for purchasing school grounds and erecting school buildings constituting part of the public school system, *and the property of the state.* All this in spite of (1) the clear direction of the Act that a system of free schools among the Indians was to be established out of the *interest* fund, and (2) the provisions of the Constitution of Minnesota making it mandatory for the legislature to establish and maintain "a thorough and efficient system of public schools in each township of the state" (Secs. 1, 2, 3, Art. VIII, Constitution of Minnesota), and of the statutes of that state, making all public schools free to all persons of school age, and making attendance mandatory between the ages of 8 and 16.

On this state of facts, appellants contend that these apparent "donations" from plaintiffs' funds to this system of public schools were unauthorized and unlawful.

Attention is further particularly invited to the following items, whose connection with the promotion of civilization and self-support seems, to say the least, remote:

Burial of Indians	$ 2,268.72
Annual celebration at White Earth	8,381.10
Payment to former chiefs of the Mille Lac Band	11,000.00
Total	$21,649.82

Attention is further invited to the following item: "For the purchase of lands for allotment to individual Indians, $40,017.31." Under the Act of 1889, all Indians entitled to allotments were to be allotted either out of the ceded lands on the reservation where they lived, or on the White Earth Reservation where ample lands were reserved for that purpose. It is submitted that the expenditure of the principal fund for this purpose was unauthorized.

F. *"Expenses, Care and Sale of Timber."*

In addition to the reimbursements and expenditures above referred to, defendant expended $547,421.25 directly from the permanent fund. This money was expended without any appropriation by or authority from Congress except such as was contained in the Act of 1889 itself (Finding 16, R. 50). This expenditure must, therefore, be justified, if at all, solely under the provisions of that Act. This expenditure forms part of the sum of $669,606.34 shown as expended from the fund in the tabulation appearing in Finding 19 (R. 53).

The major item making up this sum is "Expenses, care and sale of timber, $531,484.43."

Under the Act of 1889 the pine lands, together with the timber thereon, were to be sold at public auction by the General Land Office (Act of Jan. 14, 1889, Sec. 5, R. 39). There would have been little expense connected with this transaction, confined principally to the cost of the prescribed publication of notices of the sales. The agricultural lands were to have been disposed of to homesteaders (Sec. 6, R. 40). Nothing in the Act authorizes the separate sale of timber as such, or the expenditure of Indian funds in connection with its care or sale. The only expenses authorized by the Act to be "deducted" from the proceeds of the lands (Sec. 7, *supra*, R. 40) are those of obtaining the cessions, making the census of the bands, effecting the removals and allotments, and making the surveys and appraisals. The obvious intent was that the *disposal* of the lands (including the timber thereon) was to have been carried out by the Land Office through its regular staff at no material expense to the defendant and no charge to the trust fund.

For this reason it is submitted that the item of $531,484.43

deducted from the fund for "care and sale of timber" cannot be justified under the provisions of the Act of 1889, and stands as an unauthorized and "unlawful" disposal of trust funds for which recovery is authorized by the terms of the Jurisdictional Act.

G. *Per Capita Payments of Principal.*

The facts with regard to this claim appear in Findings 21, 22 and 23 (R. 54-56). Pursuant to the Acts of Congress described in Finding 21 and set out in full in the appendix to the court's opinion (R. 77), the United States, as trustee, took from the principal fund and distributed in per capita cash payments the sum of $5,684,341.50. The first, and largest, single distribution was made in the year 1917, pursuant to the Act of May 18, 1916 (39 Stat. 123, 135). During that year substantially one-fourth of the principal fund was distributed pursuant to that Act—the total distribution during 1917 being $1,490,668.40. The material portion of the Act of May 18, 1916, under which this distribution was made, reads as follows:

> "That the Secretary of the Interior, under such rules and regulations as he may prescribe, is hereby authorized to advance to any individual Chippewa Indian in the State of Minnesota entitled to participate in the permanent fund of the Chippewa Indians of Minnesota one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: *Provided*, That the Secretary of the Interior, under such rules and regulations as he may prescribe, may use for or advance to any Chippewa Indian in the State of Minnesota entitled to share in said fund who is incompetent, blind, crippled, decrepit,

or helpless from old age, disease, or accident, one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: *Provided further*, That any money received hereunder by any member of said tribe or used for his or her benefit shall be deducted from the share of said member in the permanent fund of the said Chippewa Indians in Minnesota to which he or she would be entitled: *Provided further*, That the funds hereunder to be paid to Indians shall not be subject to any lien or claim of attorneys or other third parties."

Of the other per capita payment acts the first two authorized distributions of $100 per capita, and the last two authorized distributions of $50 per capita, resulting in distributions from principal of $1,270,606.39 in 1922; $1,353,096.66 in 1924; $774,761.91 in 1925 and $767,898.11 in 1926 (Finding 21, R. 54).

In connection with each distribution the Secretary of the Interior required each distributee to sign a release reading as follows (Finding 23, R. 55):

"In consideration of the payment represented by check No. ....., dated ...., ..., I hereby release and quitclaim unto the United States forever all my right, title, and interest in and to that portion of the principal fund of the Chippewa Indians of Minnesota arising under the act of January 14, 1889, which has been or shall be distributed per capita to said Indians under the Act of ....., to the extent of $....."

Apparently this was a general policy adopted in connection with all these per capita payments. There was no occasion for taking such a release if this diversion of plaintiffs'

funds was one lawful under the plenary power of Congress. If, however, it was thought possible that the plenary power of Congress did not extend to such a diversion of these funds, then as to all payees who survived so as to become entitled to a share in the ultimate distribution, the government would then be in a position to recoup itself under the terms of these releases. The effect of these releases and the relief properly awardable under this claim is further discussed in the next section of this brief.

In the ten years intervening between the first per capita payment (in 1917) and June 30, 1927 (the last date covered by the report of the General Accounting Office, upon which the findings are based—see last sentence of Finding 15 (R. 50), the recipients of more than one-seventh of the entire 1917 distribution had died, and the mortality among the recipients of the later distributions was such that during the ten year period, persons who had received a total of more than $415,000 out of the several per capita payments were dead (Finding 22, R. 55). This computation covers only the first ten years after the first per capita distribution. Because of the increasing age of the original beneficiaries, a very much larger percentage of deaths must have occurred during the twelve years since 1927.

The amounts thus disbursed to individuals who have since died is not the basis of plaintiffs' present claims in this regard, but these facts are cited solely to emphasize the impropriety of these distributions from the "permanent fund" created under the Act of January 14, 1889.

In making these distributions the trustee deliberately made a distribution of principal or corpus to persons who, at the date of the distributions, were entitled to share in income only, and of whom only those who survive to the

date of final distribution will ever be entitled to any share in principal.

By these distributions of corpus, not only the amount ultimately distributable, but the interest payable by the defendant, was reduced.

The interest which would have accrued on the amounts shown to have been distributed in per capita payments (Finding 21, R. 54) from June 30th of the years in which each distribution was made, to June 30, 1939, at the prescribed rate of 5% per annum, aggregates $4,800,253.79, or more than 85% of the amount of such principal distributions. This amount would have been currently distributable by defendant to the income beneficiaries had these principal distributions been retained in the fund.

These per capita distributions in the aggregate amount of $5,684,341.50 were withdrawn from a principal fund which in 1927, the year after the last distribution, stood at only $4,855,308.09 (see tabulation included in Finding 15, R. 50). In other words, the defendant, as of that date, *had distributed more in per capita cash payments to the class entitled only to income, than remained for distribution to the class entitled to receive the permanent fund on final distribution.* In addition it will be of interest to note that as a further result of defendant's policies in dealing with this fund, *the entire balance remaining in the so-called "permanent fund"* on December 31, 1937, was only $452,496. (Hearing Before Sub-Committee of Committee on Appropriations, House of Representatives, 75th Cong. 3rd Session, on Int. Dept. Appropriation Bill for 1939, Part II, p. 18.) At page 569 of the cited document the following appears:

> "Only a few years ago the balance in the Chippewa in Minnesota fund was in excess of $8,000,000, and through special acts of Congress about $3,000,000 was

added thereto. The balance in the fund is now about $500,000. While much of the fund has been distributed to the Indians per capita, a large part thereof has been used for agency administration, hospital support, educational, and other expenditures."

In other words, $5,684,341.50 out of this principal fund has been distributed in cash to beneficiaries entitled only to income, a "large part of the fund has been used for agency administration," and, with the trust period not yet closed, there remains for distribution to the remaindermen only about $450,000. This is the "permanent fund" which was to be depleted only for (1) the expenses of carrying out the Act of 1889, (2) reimbursement for advance interest, and (3) to the extent of not more than 5% thereof for "promoting civilization and self-support."

No one contends that these per capita cash distributions were authorized by the provisions of the Act of January 14, 1889. They are not claimed to constitute expenses incurred in carrying out that Act. They were not appropriated by Congress "for the purpose of promoting civilization and self-support." In its brief below defendant as to this claim said:

> "For the reasons hereinbefore stated, defendant earnestly contends that the principal fund, under the correct interpretation of the act of January 14, 1889, was tribal property of the Chippewa Indians of Minnesota tribe and subject to the plenary power of Congress, and that *per capita payments* from that fund to these Indians were lawful exertions of that power."

These per capita payments were justified by the Court of Claims solely on the ground that they constituted a lawful

exercise of the plenary power of Congress. Thus the Court of Claims says (R. 73):

> "The Secretary of the Interior did, in accord with the acts of Congress attached hereto, make per capita distributions from the funds of the Indians in the Treasury to the amount of $5,684,341.50 and manifestly this decreased to this extent the amount of the fund available for distribution at the end of the fifty-year period. Hence the issue presented by the requested findings is identical with plaintiffs' contentions as to all claims preferred. * * *
>
> "The final result, so far as the distributees mentioned in the Act of 1889 are concerned, is in no way obscure. That, however, is not the issue. If Congress determined to utilize the existing fund for a generation of tribal Indians who in their judgment needed it to ward off the hardships of life, and who were really the creators of the fund, it was a matter for Congress to determine and not the courts."

For reasons which we have attempted to set forth in the preceding section of this brief, it is submitted that the so-called "permanent fund," and the rights of the ultimate distributees therein, were not subject to the plenary control of Congress, and that these disbursements cannot be justified thereunder.

IV.

The Remedy Sought.

Each claim asserted is based upon a disposition by the United States as trustee of portions of the principal or "permanent" fund—the corpus of the trust—for a purpose unauthorized by the agreements entered into under the Act of January 14, 1889—in other words, for a disposition of this fund *in a manner to which the necessary assent of the Indians was not given.*

The claims are asserted in behalf of the class which necessarily bears the brunt of the loss in connection with any diminution of principal, *i. e.*, the ultimate remaindermen, those entitled to share in the distribution of corpus upon the termination of the trust.

The Special Jurisdictional Act (44 Stat. 555; 45 Stat. 423; 48 Stat. 979; R. 33) expressly authorizes such a suit in the name of these appellants, who may prosecute "all legal or equitable claims arising or growing out of the Act of January 14, 1889," and, under the amendment to Section 1 of that Act, are to be considered as "representing all those entitled to share in the final distribution of the permanent fund." If this were not clear enough, the committee of Congress reporting this amendment for passage stated *(supra)*:

> "The sole object of the (amendatory) bill is to *make certain that the claims of the remaindermen,* that is the class described in the agreements as 'said Chippewa Indians and their issue' are before the court for determination. * * * The bill should be adopted so that there may be no doubt that all claims 'arising or growing out of the Act of January 14, 1889,' which the Chippewa Indians of Minnesota, *or any class thereof,*

have, may, in the pending suits, be finally adjudicated and closed."

The claims, in each instance, seek a judgment based upon the entire amount unlawfully disposed of by the trustee. This, too, is in strict accord with the Special Jurisdictional Act which provides (Sec. 4; R. 34) that if it be found "that the United States, in violation of the terms and provisions of any law, treaty or agreement * * * has unlawfully appropriated or disposed of any money or other property, damages therefor shall be confined to the value of the money or property at the time of such appropriation or disposal," plus interest.

Appellants further claim that the proceeds of any recovery for these breaches of trust should replace the misappropriated principal funds in the Treasury of the United States, there to draw interest as originally provided. This is provided for by Section 10 of the Jurisdictional Act (R. 5).

In other words, Congress has expressly directed:

(1) That the trustee, the United States, may be sued in the Court of Claims, in the name of these appellants.

(2) That the claims of "any class" of beneficiaries of the trust, and particularly the claims of the "remaindermen" shall be "finally adjudicated and closed."

(3) That if any unlawful disposition of the trust fund is shown, damages for the amount so disposed of may be had.

(4) That the amount of any such recovery be restored to the trust.

In thus providing for the return by the trustee to the trust principal of amounts unlawfully diverted therefrom Congress did not create any new rights, but merely consented that the United States be sued to enforce liabilities

to which it would have been subject as trustee, save for its sovereign immunity.

We have seen that even without statutory authorization a representative suit may be maintained in equity to vindicate the rights of a shifting and uncertain class of ultimate remaindermen whose rights are imperiled by unlawful dispositions of principal by the trustee (*Restatement of Law of Trusts*—Am. Law Institute, Sec. 214, Comment (a), quoted *supra*).

That remaindermen or ultimate distributees of a trust have an immediate and continuing right at all times during the life of the trust to have the corpus of the trust preserved, unimpaired by waste or unlawful or negligent disposal, is, we believe, elementary and needs no extensive citation of authorities.

Bogert on "*Trusts and Trustees*," Vol. 7, Sec. 814, summarizes the ordinary rules here involved as follows (italics added):

> "If the trustee pays income to a remainderman *cestui*, or capital to a life tenant, when such payments are wrongful, he is liable to the injured party for the damage caused. *The trustee must replace in the trust fund overpayments made to any cestui.* He has his own cause of action to recover the excess from the *cestui* to whom overpayment was made, and may withhold the amount of the overpayment from sums which later accrue as due the one overpaid."

The authorities cited by *Bogert* establish the right of the remainder interest to enforce the duty to restore the trust prior to its termination. Thus in the case of *Sedgwick's Curator vs. Taylor*, 84 Va. 420, 6 S. E. 226, where a trustee had expended corpus for the benefit of the life tenant, the

trustee was held liable, at the suit of a contingent remainderman, for the amount of corpus so diverted, although the life estate had not yet terminated. The court said:

> "The life tenant is still living, and the interests in remainder under the trust deed being contingent, the right to demand payment of the principal fund has not yet attached. It was competent, however, for appellee (one of the remaindermen) to maintain a suit to have the fund collected and his interest protected."

The right of a remainderman to sue for an accounting during the life of the trust was also clearly recognized in *Franz vs. Ruder* (C. C. A, 8th), 11 Fed. (2d) 854.

In *Williams vs. Sage*, 167 N. Y. S. 179, at 183, the court says:

> "A person taking a contingent remainder or gift over after a defeasible estate has, equally with the owner of the vested estate, the right to enforce due execution of the trust."

In *Pritchard vs. Williams*, 175 N. C. 319, at 322, the court says:

> "The plaintiffs as remaindermen, could have maintained an action to have the trust declared during the existence of the life interest, as without this right it would have been in the power of the trustee to defeat the trust."

In such cases the return to the trust of any money or property wrongfully disposed of by the trustee, with interest reaches "as nearly as possible what justice demands." *McComb vs. Frink*, 149 U. S. 629, at 644.

This is, of course, true, since the restoration of the trust

to its proper figure restores both annual income and corpus to the amount to which each class of beneficiaries is entitled.

The court below was impressed with the fact that if recovery were granted some individuals who had received the benefit of portions of the original trust fund (for example the per capita payees) and who survived the trust period, might be paid twice. Thus the court says (R. 65):

> "If the plaintiffs are to recover for the designated 'remaindermen' they will have received not only the benefits of the so-called trust fund during all these years but the Government will be required to duplicate the distribution to their heirs at the end of the fifty-year period."

The answer to this objection is to be found in the ordinary rules above cited, applicable to all trustees. If the wrongful disposition of trust principal consists of excessive or unauthorized payments to one who still remains a beneficiary of the trust, and, as such, is entitled to share in later distributions of principal or income, *this does not change or diminish the liability of the trustee to remaining cestuis to restore to the trust the principal amounts diverted.* The trustee's recourse against a duplication of payments in such a case is succinctly stated by Bogert *(supra)* (italics added):

> "The trustee must replace in the trust fund overpayments made to any cestui. *He has his own cause of action to recover the excess from the cestui to whom overpayment was made, and may withhold the amount of the overpayment from sums which later accrue to the one overpaid."*

As to such items as per capita cash payments to individuals who survive the trust, the adequacy of defendant's

rights in this regard are clear. Not only will defendant have the benefit of the general right of recoupment above stated, but as pointed out above, it holds a release executed by each per capita distributee releasing forever all the right, title and interest of the distributee in "that portion of the principal fund arising under the Act of January 14, 1889, which has been or shall be distributed per capita, to the extent of $ ....." (Finding 23, R. 55). These instruments, demanded and secured by defendant from each per capita distributee, furnish definite evidence of the then intent of defendant to deduct the amount distributed from any shares of corpus which ultimately accrue to any such recipient of per capita payments. Such releases serve no other purpose, and evidence a clear realization by the disbursing officers of the exact situation.

The Court of Claims recognizes the soundness of this position if it be held that recovery should be had, saying (R. 75):

> "Plaintiffs argue that notwithstanding per capita payments made to individual Indians who had died prior to June 30, 1927, and to others now living who may survive the trust period, the entire amount distributed under the special acts should be appropriated by Congress and restored to the so-called trust fund. As to the survivors, the defendant is fully protected by receipts, and as to decedents the payment was unauthorized.
>
> "'If the judgment of the court is erroneous and plaintiffs' contention hereafter sustained, the above argument will become important; it is now a stated principle of accounting, and may become important in fixing the sum to be appropriated if this court is wrong in its adjudication of the case."

As to those recipients of per capita or other improper distributions who do not survive to participate in the final distribution of the trust, recoupment from distributable shares of corpus will not be available, and any right of recoupment will be confined to interest payments accruing prior to death. As to such payments out of principal defendant is simply in the position of a trustee who has deliberately paid out principal to one not then, or ever, entitled thereto. As to such payments, as *Bogert* says *(supra)*, the trustee must replace in the trust fund the overpayment, and thereupon "has his own cause of action to recover the excess from the *cestui* to whom overpayment was made." If by reason of the insolvency of any beneficiary of defendant's breach of trust or for any other reason its cause of action for recoupment is of little value this does not on any theory mitigate the plain duty owed to all classes of beneficiaries to restore the trust corpus.

As to items such as defendant's withdrawals for its own use of amounts taken as reimbursement for unauthorized expenditures, the payment of the cost of maintaining defendant's Indian service, and similar matters, we have plain diversions of trust funds for the trustee's own benefit, as to which, if unauthorized, the duty to restore is plain.

A total of more than $17,600,000 was paid into the trust fund. That fund was designated in the Act of 1889, and the agreements of cession as a "permanent fund." It was clearly intended by both parties that save for certain limited disbursements for specific purposes, the principal fund thus established should remain intact during the fifty year trust period, for distribution in equal shares to the members of the former bands, if any, then surviving, "and their issue then living." The Indians believed and intended that they had preserved this trust estate for "posterity."

Although the assent of the Indians was necessary to the proposed disposition of their lands and the proceeds and although the terms of that assent carefully limited the disposal of the permanent fund to the specific purposes set forth in Section 7 of the Act of 1889, defendant has disbursed the fund for other purposes, in admitted and plain violation of terms of the trust. Today less than $500,000 remains for the ultimate beneficiaries. The only justification pleaded for the major part of these unauthorized disposals is that they were made under plenary power of Congress, a power in fact inapplicable here.

These disposals were unlawful and in violation of the agreements which defined the trust, and under both the plain language of the Special Jurisdictional Act and the ordinary rules as to the duties and liabilities of trustees, judgment for the restoration of the diverted funds is called for.

For the foregoing reasons it is submitted that the judgment of dismissal appealed from should be reversed.

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